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IN THE

Supreme Court of Appeals

OF

VIRGINIA

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OF THE

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RULES OF COURT

On June 10, 1912, the following order was entered by the Supreme Court of Appeals of Virginia, at Wytheville, Va.:

Ordered, That from and after this date the Virginia Reports preceding 75 Virginia shall be numbered in the following sequence, but shall be cited in this court by the name of the reporter as well as by number:

1 Washington	1 Virginia
2 Washington	2 Virginia
1 Virginia Cases	3 Virginia
2 Virginia Cases	4 Virginia
1 Call	5 Virginia
2 Call	6 Virginia
3 Call	7 Virginia
4 Call	8 Virginia
5 Call	9 Virginia
6 Call	10 Virginia
1 Hening & Munford	11 Virginia
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And the official reporter of the court is directed to publish this order on one of the fronting pages of the next two ensuing volumes of Virginia Reports.

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CASES DECIDED

IN THE

Supreme Court of Appeals

OF VIRGINIA

Wytheville

BRAGG v. TINKLING LAND AND IMPROVEMENT CO., INC., AND OTHERS

June 12, 1913.

1. DOWER—*Suit to Recover—Aliened and Unaliened Lands—Parties.*—In a suit by a widow to have dower assigned to her in the lands whereof her husband was seized in fee during the coverture, some of which lands were aliened by the husband during the coverture without her concurrence, where it is sought to have the whole dower assigned out of the unaliened lands in the hands of the heirs, to the exoneration of that aliened by the husband in his lifetime, the heirs are necessary parties to the suit, and it is error to make any decree in the cause on the merits until the heirs are made parties thereto.

Appeal from a decree of the Circuit Court of Lunenburg county. Decree for the defendants. Complainant appeals.

Reversed.

The opinion states the case.

Geo. E. Allen and *R. Grayson DeShiell,* for the appellant.

Turnbull & Turnbull, Thorp & Thorp and *McNeill, Hudgins & Ozlin,* for the appellees.

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HARRISON, J., delivered the opinion of the court.

W. J. Bragg died in February, 1909, and in August of that year his widow, the appellant, brought this suit to obtain dower out of certain lands described in her bill. The decree complained of denied the relief sought, and this appeal was taken.

A demurrer was sustained to the original bill filed by the appellant, and thereupon she filed an amended bill in which she states the following case: That during his lifetime, her husband was seized and possessed in fee simple of a tract of land in Lunenburg county, containing 423¼ acres; that by deed of trust, in which she did not unite, dated in September, 1866, her husband conveyed the tract of land mentioned to a trustee to secure debts; that subsequently her husband was adjudged a bankrupt, and the land was sold by authority of the bankrupt court, subject to her contingent right of dower therein, and conveyed to the purchaser; that since this sale by the bankrupt court the land has passed into other hands, a large part of it having been subdivided into small town lots, which are now owned by numerous alienees who have improved the same; that she has never been assigned her dower in any part of the land or received the commuted value thereof; and that her right to dower in such land has never been relinquished except in a small portion thereof acquired by the Virginian Railway for railroad purposes. The bill charges that in view of the construction and operation of the Virginian Railway and the Rapid growth and development of the town of Kenbridge, a portion of which is located on part of the land in which she is entitled to dower, and for other reasons, the land has become very valuable, and that it is now impracticable if not impossible to assign her dower in kind, in at least a part of the land; that about 350 acres of the original

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tract of 423¼ acres is valuable farm land, in which her dower might be assigned in kind, though with great injustice to her, and almost equal injustice to the other owners; that as to that portion of the land which has been laid off into town lots, and on which are standing residences, stores, warehouses, churches, etc., complainant says that it is impossible to assign her dower therein in kind without great injustice to her and equal injustice to the present owners. She does not, therefore, ask to have her dower assigned in kind but insists that she is entitled to have the same ascertained and paid to her in a lump sum according to the annuity tables provided by section 2281 of the Code. The numerous alienees of the land are made parties defendant, and the prayer of the bill is that a commissioner be directed to report to the court the value of the farming land mentioned in the bill, and also the value of the town lots mentioned therein, and what damages if any the complainant has sustained by the detention of her dower, and whether the farm lands can be divided so as to assign the complainant her dower therein without injustice to her or the present owners, and likewise to report whether it is practicable or possible to assign dower in kind in the lots mentioned, and for such general relief as the complainant may be entitled to.

A number of the defendants filed a joint and separate answer, in which they admit that the husband of the complainant was seized and possessed of the 423¼ acres of land mentioned in the bill; that such land was sold and conveyed as alleged; and that it is now owned in part as set out in the bill. Further answering, respondents aver that the husband of the complainant died seized and possessed of certain other lands in Lunenburg county, one tract containing 371½ acres, and an undivided half interest in another tract containing 178½ acres, and they insist that the dower of the complainant can be assigned

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her out of these lands, and that under the law such dower must be assigned her out of the lands of which her husband died seized, if they be sufficient for that purpose, in exoneration of the lands held by the respondents. But, say respondents, if the lands mentioned in the bill are not to be exonerated as claimed, then they ask that under section 2278 of the Code the court will ascertain the values of the respective parcels of land in the bill mentioned, deducting the value of all permanent improvements made since the alienation to J. T. Tisdale (the purchaser at the bankrupt sale), and will permit the defendants to pay legal interest to the complainant annually on one-third of the value of their respective parcels of land during the lifetime of the complainant.

The case was heard upon the bill and answer alone; the decree appealed from deciding that the dower of the complainant must be assigned her in the lands of which her husband, W. J. Bragg, died seized, in exoneration of the lands mentioned in the bill. The decree then states that no inquiry is directed because the complainant admits that her husband left sufficient lands to satisfy her dower rights, and it is, therefore, ordered that the cause be removed from the docket.

It is conceded at bar that the lands left by W. J. Bragg are in the possession of his heirs. This being so, we are of opinion that it was error to enter any decree in the cause upon the merits until the heirs were made parties. The bill states a *prima facie* case entitling the complainant to the relief asked, and the answer admits the facts alleged so far as necessary to establish her primary right to dower in the lands held by the respondents, but seeks to avoid such liability by transferring the burden to the land in the possession of the heirs.

We are of opinion that the heirs are necessary parties and entitled to be heard before any proper or binding de-

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cree can be made in the premises. The lands bought by the defendants were, as alleged in the bill, sold subject to the complainant's contingent dower rights therein, and inasmuch as the defendants now seek to be exonerated from that burden by having the same transferred to the lands held by the heirs, it was incumbent upon them to file a cross-bill alleging the facts entitling them to such exoneration, and making the heirs parties defendant, so that when a decree was entered disposing of the controversy on its merits all parties in interest would be concluded thereby.

The decree appealed from must be reversed and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

Reversed.

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Wytheville

BLUNT v. MERCANTILE RAILWAY AND LOAN ASSOCIATION AND OTHERS.

June 12, 1913.

1. STOCKHOLDERS—*Creditors—Case in Judgment.*—The evidence, in the case in judgment, taken as a whole, shows that the appellant was a creditor of the appellee company and not a stockholder thereof.

Appeal from a decree of the Circuit Court of the City of Alexandria. Decree for the defendant. Complainant appeals.

Reversed.

The opinion states the case.

Howard W. Smith and *S. G. Brent,* for the appellant.

J. K. M. Norton and *Gardner L. Boothe,* for the appellees.

WHITTLE, J., delivered the opinion of the court.

On January 12, 1911, upon a bill filed by its board of directors, the appellee, the Mercantile Railway Building and Loan Association of Alexandria, Virginia (hereinafter called the association), was placed in the hands of a receiver. Subsequently the appellant, C. T. Blunt, was admitted as a party to the litigation and asserted a demand as creditor against the association for two alleged loans aggregating $2,100.

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Appellant contended that on December 31, 1909, he deposited $1,800 with Lewis Hooff, secretary of the association, upon written contract, for the term of three years, at 5½ *per cent.* interest, withdrawable on ninety days notice; and that on July 7, 1910, he made an additional deposit of $300 upon precisely the same terms.

The receiver, on the contrary, maintained that these deposits represented the purchase price of eighteen shares and three shares, respectively, of paid-up stock.

The controversy was referred to a master commissioner in chancery, who sustained the receiver's contention with respect to the $1,800 deposit, but overruled it as to the deposit of $300. The circuit court confirmed the report, and from so much of the decree as applied to the $1,800 this appeal was granted.

The issue is thus sharply drawn between the parties as to the status of the $1,800 deposit. The appellant maintains that being in no respect distinguishable from that of the $300 it should have been carried into the savings department of the association and appellant classed as a preferred creditor with regard to it, as was done in the case of the latter deposit.

The written evidence of the agreement between appellant and the association concerning these sums consists of two entries made by the secretary in a blank pocket deposit book of sales of stock on instalments, as follows: "1909, Dec. 31st, $1,800.00, paid in full, int. at 5½ *per cent.* for a term of three years, 90 days notice required on withdrawal. Lewis Hooff, Secty." And on the second page: "July 7, 1910, $300.00, paid in full, int. at 5½ *per cent.* for a term of three years, 90 days required on withdrawal. Lewis Hooff, Secty." On the outside cover of this book (the name, date, figures and "in full" written and the rest printed) is the following memorandum made, but not signed, by Lewis Hooff: "Name C. T. Blunt. Date of Cer-

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tificate Dec. 31, 1909. No. 8706. No. of shares 18. Payment, $1,800.00 in full."

Hooff and Blunt both gave their depositions, and the former testified that his understanding was that both amounts paid to him by Blunt were for the purchase of stock. He had no independent recollection on the subject, however, but considered a book of certificates showing "Stub No. 8706 for 18 shares of stock issued to C. T. Blunt, December 31, 1909," from which the certificates had been removed, "proof positive" so far as the $1,800 deposit was concerned. Witness found no such memorandum with respect to the $300 deposit; yet it is shown by the positive testimony of Hooff and Blunt that both sums were deposited upon absolutely the same terms, and their statements are verified by the contemporaneous written agreement of Hooff, secretary. Appellant moreover testified unequivocally that the payments were not made on account of stock transactions; that he did not intend to purchase stock, and, in point of fact that no certificates of stock were ever delivered to him. Besides, it was shown from the by-laws of the association that a candidate for membership had first to sign a formal application in writing that he wished to acquire stock, and also obligate himself to strictly observe the by-laws, rules and regulations of the association. Though specifically called for, and though witness agreed to look it up, no such application was produced, nor was it shown that appellant's name appeared among the list of stockholders. If such had been the fact, it ought readily to have been shown by the records of the association, other than mere *ex parte memoranda* of Hooff, that Blunt was indeed a stockholder. Appellant testified explicitly, and there was no evidence to the contrary, that he never attended a meeting of stockholders, and never was notified of such meetings; nor did he receive any dividends from surplus profits to which,

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as a stockholder, he would have been entitled. The dividends declared on stock were five *per cent.,* which rate the commissioner erroneously reported that Blunt received; whereas the association paid him 5½ *per cent.* in accordance with the terms of his special agreement in writing with the secretary. Hooff testified that he had a special arrangement with Blunt by which he paid him interest at the rate of 5½ *per cent.* until the failure of the association. In that connection he explained that he agreed to pay 5½ *per cent.* because the money was worth it to the association, and was a cheaper rate than the banks charged. In reply to a letter addressed to the secretary by Blunt he employs this language: "Yes, we can use $300.00." He would hardly have so written in reply to an application to buy stock. Again, the by-laws prescribe that paid-up stock cannot be withdrawn until after six months from the date of issue; yet the special agreement in this case stipulated for the return of the money on ninety days' notice. Hooff also testified that he supposed they had stubs of checks covering interest paid on these deposits, and he was called on to look them up and file them with the commissioner, but they were never filed. These stubs and corresponding checks, if produced, would probably have shown whether they were dividend or interest checks.

Upon careful consideration of the evidence as a whole, we are of opinion that it sustains the contention of appellant that the $1,800 deposit was made upon the same terms as the $300, and that for the first amount, as for the last, he was entitled to be classed as a creditor and not as a stockholder of the association. The inference that Blunt was a stockholder, drawn from memoranda made by Hooff as secretary upon the stub of one of the stock books and upon the pocket deposit book of sales of stock on instalments, is outweighed by the contemporaneous written

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agreement and other direct and circumstantial corroborating evidence bearing on the transaction .

For these reasons the decree of the circuit court must be reversed, and the cause remanded for further proceedings, to be had in accordance with the views expressed in this opinion.

Reversed.

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Wytheville

BOYD v. SOUTHERN RAILWAY CO.

June 12, 1913.

1. DEMURRER TO EVIDENCE—*Conflicting Evidence—Railroads.*—Where the evidence is conflicting as to whether or not a railroad company was negligent in the operation of a train which inflicted the injury complained of, and there is a demurrer thereto by the company, the negligence of the company must be considered as established.

2. RAILROADS—*Grade Crossing—Negligence of Traveller—Last Clear Chance.*—While it is the duty of a railroad company to give notice of the approach of its train to a crossing, the reciprocal duty is imposed upon a person about to go on its track to exercise ordinary care and caution, whether it be a highway crossing or a licensed way, and if he fails to look and listen, and attempts to cross the track in front of a moving train and is injured by it, his own negligence so contributes to his injury as to bar recovery, unless the railroad company, after it discovered or ought to have discovered his peril, might have avoided the injury by the exercise of ordinary care.

3. RAILROADS—*Grade Crossing—Spur Tracks—Rights of Owner or Employee on Premises.*—The fact that an employee of a manufacturing company is on the private property of the company, going to his place of business, does not excuse him from looking and listening before going upon a spur track of a railroad rightfully operated through the company's grounds. His rights at such crossing are no higher (if as high) than if it had been a public highway crossing.

4. RAILROADS—*Spur Tracks—Crossings—Travellers—Look and Listen—Negligence.*—A person familiar with the tracks and sidings of a railroad who is injured by being struck by a shifting engine on a spur track is not relieved of the imputation of negligence in failing to look and listen before going upon the track by the fact that he had shortly before that met the engine going in upon the spur track to which there was no other outlet. He must have known that the engine would return as soon as it accomplished its work, for in no other way could it have finished its shifting or returned to the main line.

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5. RAILROADS—*Grade Crossing—Negligence of Traveller—Last Clear Chance*—Where a traveller is struck by a railroad engine at a grade crossing as soon as he steps upon the track, it cannot be said that the railroad company had the last clear chance of avoiding the injury. He was not in peril until he started to cross the track, and it was then too late for the engineer to have stopped his train or avoided the injury if he had been on the lookout and had seen the plaintiff's danger.

Error to a judgment of the Corporation Court of the City of Danville in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Scott & Buchanan, Harry Wooding, Jr., and *B. H. Custer,* for the plaintiff in error.

William Leigh, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is an action to recover damages for personal injuries suffered by the plaintiff in error, caused as is alleged by the negligence of the defendant railway company. Upon the trial of the cause the defendant demurred to the evidence, in which the plaintiff was required to join. The court sustained the demurrer, and rendered judgment in favor of the defendant.

Error is assigned, not only to the judgment of the court in sustaining, but also to its action requiring the plaintiff to join in, the demurrer. This latter assignment of error does not seem to be much relied on, and if it were, we see nothing in the record, nor is anything suggested by the plaintiff's counsel, to show that the court erred in requiring a joinder in the demurrer.

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Upon the merits, it appears that the plaintiff received the injuries complained of at a grade crossing over the defendant's spur track leading from its main line into the yard of one of the mills of the Riverside and Dan River Cotton Mills Company, located in or near the city of Danville. The road upon which the plaintiff, who was an employee of the Cotton Mills Company, was travelling was upon the property of that company, and was used by its employees who lived in certain portions of the city in going to and from their work, by wagons and other vehicles, and by all persons who had business at the mill, including children who carried dinner to their parents or other relatives working there.

The contention of the plaintiff is that the defendant was guilty of negligence in the operation of its train at the time the plaintiff was injured. The evidence is conflicting, but upon a demurrer to it the negligence of the defendant must be considered as established, since there was evidence tending to show that the engine, which was running backwards, gave no warning or notice of its approach to the crossing by ringing the bell or otherwise; that none of the train crew were on the lookout for the crossing, although the defendant knew that persons crossed its track at that point at all hours of the day.

The negligence of the defendant having been established, the next question is, did the plaintiff contribute to his own injury, as the defendant contends?

It appears from the plaintiff's own testimony that as he approached and went upon the crossing he neither looked nor listened. There was nothing to obstruct his view in the direction from which the defendant's train came, or to interfere with his hearing. While advanced in years, he was in full enjoyment of all his faculties. Unless, therefore, there be something in this case to take it out of the general rule, it is clear that the plaintiff must be held to have

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contributed to his own injury; for no general rule of law is better settled in this jurisdiction and generally, it is believed, than that while it is the duty of a railroad company to give notice of the approach of its train to a crossing, the reciprocal duty is imposed upon a person about to go on its track to exercise ordinary care and caution, whether it be a highway crossing or a licensed way. The track itself is a proclamation of danger. It is his duty before going upon it to use his eyes and ears. If he fails to look and listen, as his duty requires him, and attempts to cross the track in front of a moving train and is injured by it, his own act, his own negligence, so contributes to his injury that he is not entitled to recover, unless the railroad company after it discovered, or ought to have discovered, his peril, might have avoided the injury by the exercise of ordinary care. *Johnson* v. *C. & O. Ry. Co.*, 91 Va. 171, 179, 21 S. E. 238; *Washington, &c., R. Co.* v. *Lacy*, 94 Va. 469, 475-6, 26 S. E. 834; *Southern Ry. Co.* v. *Hansbrough*, 107 Va. 733, 741-2, 60 S. E. 58; *Morton's Ex'or* v. *Southern Ry. Co.*, 112 Va. 398, 405-6, 71 S. E. 561.

One of the grounds relied on to take this case out of the general rule that the failure of the plaintiff to look and listen for the approach of trains before going upon the crossing was *per se* negligence, is that "the plaintiff was not on the (railway) company's property but in the yard and on the private property of the cotton mill company for which he worked, and that he had as much right to be there *en route* to business as the railroad company did, if not more."

The defendant company had acquired a right of way (20 feet in width) through the said property of the Cotton Mills Company, by deed, for the location of its switch, and there were no limitations imposed by the conveyance, except that in the event the defendant abandoned the use of the property for railroad purposes it should revert to the

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Cotton Mills Company. Clearly the Cotton Mills Company and its employees had no higher rights (if as high) in passing over that crossing than they would have had if it had been a public highway crossing.

Another ground relied on to take this case out of the general rule that the failure of the plaintiff to look and listen for an approaching train before going upon the crossing was negligence as a matter of law, is that he had been lulled into a sense of security and thrown off his guard by the conduct of the defendant and the circumstances surrounding him when injured.

The plaintiff that day had gone from his work at the Long Mills by permission to attend to some private matters, and was returning to his work between one and two o'clock. After getting off a north Main street car, he was proceeding along River street in the direction of Long Mills, the place of his work, when he passed the train which afterwards injured him. The train consisted of five cars and an engine. The engine was pushing the cars on a spur track which passed by Dan Valley Mills, also property of the Cotton Mills Company. That spur track leads from another spur track of the defendant company some ten or fifteen feet east of the fence which enclosed the yard in which the plaintiff was injured, and terminates fifty or sixty feet east of the Dan Valley Mills. The other spur track, which is known as Cotton Mills Siding No 2, runs out from the defendant's main line a few feet west of where the latter crosses north Main street of the city of Danville and extends into the yard of the Cotton Mills Company, by and beyond the Long Mills. The street or road upon which the plaintiff was travelling when he passed the defendant's train runs between these two spur tracks for a distance, as shown on the map filed with the record and a part thereof, between three hundred and four hundred feet, when it crosses the Dan Valley Mills spur track; thence it

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runs between one hundred and one hundred and fifty feet south of both spur tracks where it enters the cotton mills enclosure through a gate; thence about one hundred and seventy feet near to and almost parallel with siding No. 2, when it crosses it obliquely; and thence by and beyond Long Mills, where the plaintiff was employed.

The plaintiff's contention is that he was excused from exercising the same degree of care in looking and listening before going upon the crossing when injured, because he had met the train going in an opposite direction, and there was nothing to suggest to him, or any other reasonable man, that it would immediately return without notice or warning of any kind.

There is a class of cases in which it is held that reasonable belief that no train is approaching a crossing relieves a traveller who fails to look and listen of the imputation of negligence as a matter of law.

In the case of *Kimball & Fink* v. *Friend,* 95 Va. 125, 27 S. E. 901, where there was a silent gong, and in *Southern Ry. Co.* v. *Aldridge,* 101 Va. 142, 43 S. E. 333, where the watchman failed to perform his duty, it was held that the question of negligence on the part of the travellers in going upon the crossing where injured, was a question of fact for the jury, under all the facts of those cases, and not a question of law for the court.

It has also been held that the traveller's negligence is a question for the jury where he attempts to cross a railway track immediately after one train has passed and another follows so quickly as to mislead or confuse him and he is injured. And in cases of flying switches, where the train has been severed and the traveller goes upon the crossing after the first section has passed and is struck by the second; and also where a traveller sees a train pass on or towards the main line of the railroad, goes upon the track and is injured by the train immediately returning. See

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cases cited in note to *Scott* v. *St. Louis Ry. Co.*, 9 Am. & Eng. Ann. Cases, 216.

The decision chiefly relied on by the plaintiff's counsel in this case and the one most largely quoted from in his petition and brief, is that of *Duane* v. *Chicago, &c., Ry. Co.*, 72 Wis. 523, 40 N. W. 394, 7 Am. St. Rep. 879. But that is a very different case from the one under consideration. In that case, after stating the general rule as to the duty of a traveller to look and listen before going on a crossing, the court said: "There is a most important fact in this case that materially modifies this strict rule and makes it inapplicable, and that is that this train had just passed this crossing, while the deceased was within a few rods (8) of it and driving upon a trot, and had passed on out of his sight, and he had reason to suppose that it would continue on, it being upon the main track, like any other train upon its regular route, and had no reason to suppose that it would immediately return. The presumption is that it would go on and not return. He was thus thrown off his guard. There was no reason to look or listen in that direction further, for it appeared impossible to him that any train from that direction would or could approach the crossing within so short a time. He was entrapped by this unexpected return of the train, for its sudden return over the crossing without warning was to him a trap. We know how it must have appeared to him; for it would have so appeared to any ordinary person with the same knowledge and (in the same) situation. Not knowing or supposing or having any reason to suppose that this train would immediately return, or that any train would come from that direction, he did as any other reasonable person would have done and kept straight on without lessening his speed as if assured that the way was clear and there was no possible danger. To have stopped and looked and listened in that direction under the circumstances would have been

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unreasonable, and the law requires no such unreasonable thing as a duty and obligation."

In this case, when the plaintiff passed the defendant's train, it was not on or going towards the main line. It was on a spur track only five hundred or six hundred feet long, and which terminated fifty or sixty feet beyond Dan Valley Mills, for the convenience and benefit of which that spur track was chiefly used. When the plaintiff passed the train he was at least as far from the crossing where injured as was the train from the end of the spur track. There was no spur track leaving the siding on which the train was running when the plaintiff met it. He therefore knew, if he was giving any attention to his surroundings, that the shifting train, whether going to Dan Valley Mills to place a car or to take out a car, would as soon as it had done that work in all probability—indeed, almost certainly—go back in the direction from which it came and in which he was going, for in no other way could it finish its shifting, if more was to be done, or go back on the main line from which it came. Not only would the shifting engine have to go back in that direction before doing shifting on siding No. 2, or in reaching the main line with its train, but it would be compelled to go back upon or over the crossing which the plaintiff was approaching and where he was injured. The engine which struck the plaintiff being used on those switches chiefly if not entirely for switching purposes, the plaintiff must have known that in doing its work it would necessarily run backwards and forwards over them. That it would do so was to be presumed, for otherwise it could not do that work.

Instead, therefore, of the facts and circumstances of this case relieving the plaintiff from the duty of looking and listening before going upon the crossing, they show, as it seems to us, that he not only did not have any reasonable ground to believe that the train would not return before he

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could pass over the crossing, but that it was highly probable that it would do so. Certainly there is nothing in the facts and circumstances of the case to take it out of the general rule, that failure to look and listen before going upon a railway crossing is *per se* negligence.

But it is insisted by the plaintiff that even if he was guilty of contributory negligence, the court erred in sustaining the demurrer to the evidence, because the defendant could by the exercise of ordinary care have avoided injuring him after it saw or ought to have discovered his peril. It clearly appears from the plaintiff's own evidence that he was struck by the corner of the tender of the engine, just as he entered upon the crossing, as he stepped on or over the rail nearest to him, and was thrown back on the side of the track from which he approached the crossing. He was not in peril until he started to cross the track, and it was then too late for the engineer to have stopped his train or avoided injuring the plaintiff if he had been on the lookout and had seen the plaintiff's danger.

Upon the whole case we are of opinion that there is no error in the judgment complained of, and that it should be affirmed.

Affirmed.

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Syllabus.

Wytheville

CAMDEN v. VIRGINIA SAFE DEPOSIT AND TRUST CORPORATION.

June 12, 1913.

1. CORPORATIONS — *Insolvency—Receivership—Equity Jurisdiction.*—As the directors of a banking corporation occupy towards its stockholders and creditors the relation of trustees, bound to the exercise of due care in the management of its affairs, and are liable for any negligence on their part resulting in an inadequacy of its assets to discharge its liabilities, they may, upon the threatened insolvency of the company, apply to a court of equity to take charge of its assets and so administer them as to diminish as far as possible the injury to all concerned, including creditors, depositors and stockholders.
2. CORPORATIONS—*Insolvency—Receivership—Suit by Directors—Dissolution.*—A bill filed by directors of a corporation, who are also stockholders, for the sole purpose of collecting its assets and distributing them equitably amongst those entitled, is in no sense a bill to wind up the corporation. The result may be the application of all the assets of the corporation to the discharge of its liabilities, and its consequent inability to continue business, but neither insolvency nor the appointment of a receiver operates a dissolution of the corporation. A corporation may exist as a legal entity without any property or assets.
3. CONTEMPT—*Insolvent Corporations—Receivers—Wrongful Disbursements by Agent of Corporation—Parties.*—Where a court of equity has appointed receivers of a corporation and directed them to take charge of all the assets of the corporation to be administered by the court, and the agent in charge of a branch of such corporation has been duly notified of the appointment of the receivers and of their duties in the premises, if such agent thereafter wrongfully pays over funds of which he was the custodian to a creditor of the corporation he is guilty of a contempt of court, and may be proceeded against therefor, although not a party to the suit in which the receivers were appointed.
4. CONTEMPT—*Inability to Pay Money Judgment—Imprisonment.*—Where, in a proceeding for contempt, there is a decree for money against the defendant and also an order that unless the money be paid within a stated period the defendant shall be

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attached and confined in jail, the payment of the money in accordance with the terms of the decree, or inability upon the part of the defendant to pay it on account of poverty, insolvency, or other cause not attributable to any fault of his, should be taken as a satisfaction, and all further proceedings for contempt should be discontinued.

Appeal from a decree of the Corporation Court of the city of Alexandria, in which the appellant was proceeded against for a contempt of court. From an adverse decree he appeals.

Affirmed.

The opinion states the case.

Harrison & Long, for the appellant.

S. G. Brent, for the appellee

KEITH, P., delivered the opinion of the court.

This suit originated in a bill filed by Thomas J. Fannon and others, as directors and stockholders of the Virginia Safe Deposit and Trust Corporation, in which it is stated that the defendant was incorporated under the laws of the State of Virginia, with its principal office and place of business in the city of Alexandria, Virginia, and had been for some years past engaged in the business of a trust and bonding company in said city; that it received deposits as a bank and had numerous branches in various parts of Virginia where deposits of money were received, and that said company acted as a bonding company, executor, trustee, etc.; that there were deposits of large amounts of money with the company, and that it possessed large resources and assets, ample it was believed to meet all its obligations to depositors and creditors, and to all estates and

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trusts for which it was bound; that owing to the illness of the president of the defendant, and being without reasonable assurance that he would be able personally to conduct its affairs for some time to come, the complainants found themselves unable to carry on the business of the defendant; that while it was believed that the assets of the corporation would be ample to meet all of its obligations, yet as there would be calls, in the near future, for large sums of money, they doubted their ability to raise the same, deprived of the services of their president, nor could they hope successfully to conduct the business of the defendant in the future; that because of these conditions the purposes for which the company was formed have failed, and it cannot be longer conducted either profitably or to serve any purpose of its creation or existence; that for the protection of its assets for the benefit of its depositors, for those for whom it had acted as executor, trustee, etc., and for those for whom it had given bond, it was necessary and imperative that its affairs be taken charge of by a court of equity, that a receiver or receivers be appointed, that its assets and resources be collected and realized upon and distributed amongst those entitled thereto equitably as their interests might appear; that complainants are all of its directors except its president, and have approved this application to the court, as appears by a resolution of the directors attached to and asked to be read as a part of the bill; that in order to secure all depositors and other creditors against any possibility of loss, in any event, the president of the defendant had conveyed to it large properties, mostly valuable real estate, of an estimated value of $200,000. Wherefore the complainants pray that the Virginia Safe Deposit and Trust Corporation be made a party defendant to the bill and required to answer the same, an answer under oath being waived; that a receiver or receivers may be appointed

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for the said defendant; that its assets may be collected and distributed and its affairs wound up under orders of the court.

To this bill one of the plaintiffs made oath, and at a subsequent day the corporation appeared by its counsel and filed its answer, in which it says, "That it admits all the allegations of the bill of complaint and joins with the complainants in the request that a receiver be appointed for it, and that its affairs be wound up under orders of this court."

Thereupon, receivers were appointed of the Virginia Safe Deposit and Trust Corporation and all the branches thereof, and were directed to take charge of all the assets of the defendant and its branches, and all property, real, personal and mixed, to collect all debts, and hold the same subject to the orders of the court.

On June 10, 1911, the receivers reported that R. Lee Camden, the manager of the branch of the defendant company at Lovingston, Virginia, had paid out to Mrs. F. H. Kidd on a certificate of deposit the sum of $2,111.08, and divers sums to certain other parties which need not be further referred to.

The cause coming on to be heard on the 15th day of June, 1911, upon the papers formerly read and the report of the receivers, a rule was directed to be issued against E. L. Kidd, Mrs. F. H. Kidd, his wife, and R. Lee Camden, the manager of the Lovingston branch, returnable within ten days, "to show cause, if any they can, why they should not be proceeded against for contempt, and further why judgment should not be entered against them" for the amount of the payment.

Kidd and his wife, and Camden, filed their answers to this rule, and such proceedings were had as resulted in a decree of July 21, 1911, which recites, that the sum of $2,193.33 was turned over by Camden, manager of the

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branch of the corporation at Lovingston, Va., after he had been notified that the receivers had been appointed, to E. L. Kidd as agent for his wife, Mrs. F. H. Kidd; that the said sum had not been returned to the receivers; and it was thereupon adjudged, ordered and decreed that the said E. L. Kidd, Mrs. F. H. Kidd, and R. Lee Camden do restore, pay and turn over forthwith to the receivers in the cause the said sum of $2,193.33 with interest thereon from the 29th day of December, 1910; and a decree was entered in favor of the receivers against the said parties, jointly and severally, for the said sum with interest thereon. It was further decreed, "that unless the said E. L. Kidd, Mrs. F. H. Kidd and R. Lee Camden, or some one of them, shall, within thirty days from this date, restore, pay and turn over to J. K. M. Norton and Howard W. Smith, receivers in this cause, the sum of $2,193.33, with interest thereon from the 29th day of December, 1910, the clerk of this court is directed and ordered to issue an attachment directed to the sheriff of Nelson county, Virginia, requiring him to attach and take in custody the persons of the said E. L. Kidd, Mrs. F. H. Kidd and R. Lee Camden, and deliver them to the sergeant of the city of Alexandria, . . . to be by the latter held and confined in the jail of the city of Alexandria, Virginia, until the said sum and interest and costs be paid as above directed, unless sooner released by order of this court or the judge thereof."

From that decree Kidd and wife obtained an appeal to this court, and the decree of the corporation court of Alexandria was reversed, the court being of opinion that "imprisonment for debt passed away in this State with the abolition of the *capias ad satisfaciendum* in 1849, and, in a proceeding for contempt, where the contempt is not established, it is error to seek to enforce the return of money improperly paid by an order directing the imprisonment

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of the defendant if the money be not paid." See *Kidd* v. *Va. Safe Dep. & Tr. Corp.*, 113 Va. 612, 75 S. E. 145. The court, in the course of its opinion, said: "We are of opinion that the evidence was not sufficient to find the appellants guilty of the contempt with which they were charged;" and the opinion concludes as follows: "The decree of July 21, 1911, so far as it affects the appellants, is erroneous, and must be reversed, and the contempt proceeding as to them dismissed."

The only appellants at that time were E. L. Kidd and Mrs. H. F. Kidd. At a subsequent day R. Lee Camden filed his petition for an appeal from the same decree, which was awarded July 20, 1912.

The errors assigned by Camden in his petition are, first, that the court should have dimissed the rule on the ground that it was without jurisdiction.

The bill was filed by certain individuals styling themselves directors and stockholders of the defendant corporation. The object of the bill plainly is to have all the assets of the corporation administered by a court of equity so as to protect the rights and interests of all concerned. The bill states the case of the plaintiffs very briefly and succinctly, but from its averments no doubt is left that the affairs of the defendant were much complicated. It conducted not only a bank of deposit in Alexandria with branches in other parts of the State, but it acted as a bonding company, as executor and as trustee. It had large liabilities and resources, including an assignment by its president for the benefit of depositors and other creditors of real and personal property of an estimated value, as stated in the bill, of $200,000.

In *Marshall* v. *F. & M. Savings Bank of Alexandria*, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84, this court quotes with approval from Morawetz on Private Corporations, who, speaking with reference to the duties of

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directors, says (sec. 552), that "the plain and obvious rule is that directors impliedly undertake to use as much diligence and care as the proper performance of the duties of their office requires. What constitutes a proper performance of the duties of a director is a question of fact, which must be determined in each case in view of all the circumstances, the character of the company, the condition of its business, the usual methods of managing such companies, and all other relevant facts must be taken into consideration."

In the course of its opinion in that case the court said: "The high degree of confidence and responsibility resting upon directors of corporations has often led the courts to regard them as trustees, and to declare the relationship existing between them and the stockholders to be that of trustees and *cestuis que trustent,* respectively. If this can be asserted with regard to the generality of corporations, it is peculiarly and exceptionally true with regard to banking corporations. The directors of a bank are not trustees for the stockholders alone, but they owe an even earlier duty to the depositors. The law is, as it ought to be, very jealous in exacting the strict and thorough performance of these duties, and it is in the scrutiny of possible breaches of them that the rigid rules which govern trustees have been applied. It is not enough to exculpate a director that no actual dishonesty can be shown; that he cannot be positively proved to have been influenced by interested motives."

Such being the relations that the directors occupy towards the corporation, the duties which they owe the creditors and depositors, and the obligations which they incur if those duties be not faithfully performed, it would seem to follow that in the faithful discharge of their duties it would be proper for them to apply to a court of equity so to administer the affairs of the embarrassed corporation

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as to diminish as far as possible the injury to all concerned, including creditors, depositors and stockholders. Owing to the relation existing between the directors and the corporation, they must be presumed to have an intimate and intelligent acquaintance with its affairs, and to be able to direct and assist in realizing its assets and in ascertaining its obligations, and to that end to apply to a court of equity for its assistance.

For another reason directors should be allowed to file such a bill as that before us. If the assets of the corporation prove inadequate to satisfy its liabilities, the directors are liable to stockholders and creditors for any damages which may accrue by reason of any negligence on their part, and it would seem to be nothing more than just that they should be allowed to come into court and defend themselves by anticipation against any possible charge of neglect of duty as directors, or if such neglect in fact existed use all the means at their disposal to repair the consequences of their default to themselves and to others.

This bill is in no sense one to wind up the corporation. Its sole object is to collect the corporation's assets and distribute them equitably among those entitled.

In Thompson on Corporations (2nd ed.), sec. 6485, it is said: "The mere insolvency of a corporation, however extreme, will not operate as a dissolution of the corporation. While this may be a ground for the appointment of a receiver or an assignment for the benefit of all creditors, still a corporation may exist as a legal entity without any property or assets, and that by unfortunate business transactions it has become totally bankrupt, or by some extraordinary disaster has been stripped of all its property, so that it is unable to continue its business or pay its existing indebtedness, still it is not dissolved."

Nor does the appointment of a receiver operate a dissolution of the corporation; and this is true though the re-

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ceiver, in the discharge of his duties, may sell and dispose of all the corporation property. *Ibid,* sec. 6486.

We are of opinion that the court had jurisdiction to appoint receivers, and to collect and distribute the assets of the corporation.

As we have seen, the case of *Kidd* v. *Va. Safe Dep. & Tr. Corp., supra,* went off upon want of proof to establish the contempt. Kidd and his wife had no relation to the corporation other than as depositors. They denied that when they collected the money due upon the certificate of deposit they had any knowldege of the appointment of receivers to take charge of the assets of the corporation, and the court held the proof to be insufficient to overcome that denial. With reference to the appellant, however, the case is different. He was the manager at the town of Lovingston, Nelson county, Va., of a branch of the Virginia Safe Deposit and Trust Corporation. The trust company was itself in possession of the money deposited in that bank and stood towards its depositors in the relation of a debtor to creditors. Camden was the mere custodian and agent of the trust company, the manager of its affairs, and subject to its orders with respect to the business entrusted to him.

In his answer to the rule he says, that about ten o'clock on the morning of the 29th of December, 1910, while he was waiting on a customer, he received a telegram as follows: "Receivers were appointed last evening for Virginia Safe Deposit and Trust Corporation. Close doors of your branch and transmit all funds on hand to the receivers by express. Receive no further deposits. (Signed) C. J. Rixey, Pres., John D. Barbour, J. K. M. Norton, Receivers." That he was greatly shocked by the news, and at the earnest solicitation of Kidd, who represented that the loss of the deposit made by his wife, which represented the savings of a life-time and the fruits of hard work as a teacher, would result in her death, he yielded to his re-

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quest and paid to him the sum of $2,193.33, the amount of the said certificate of deposit held by Mrs. Kidd.

Testifying as a witness in his own behalf, in answer to a question propounded to him by the court, as to whether or not Kidd knew that the bank had been put into the hands of receivers, he said: "I think so."

"Q. Can you be positive about that? A. I think so. I know that I recall the fact that Mr. Whitehead and Mr. Kidd—they promised not to give out the fact that I had paid them the money."

"Q. Was anything said if you should be called upon to make good the money that you paid Mr. Kidd and Mr. Whitehead at that time? A. I do not recall what Mr. Kidd said about that. I know that they both promised not to give out the fact that the money was paid them. At least I requested them to do so. I know that."

So that it appears, not only that he received a telegram notifying him that the corporation had been put into the hands of receivers and directing him to close the doors of the branch of which he was the manager, and transmit all funds in his possession to the receivers by express, and receive no further deposits, but that with full knowledge of these facts and with consciousness that he was doing that which he had not the lawful right to do, he wrongfully paid over the money with an injunction that his act was to be kept secret.

In section 145 of High on Receivers, it is said that courts are reluctant to interfere by receiver with property of third persons, and that the receiver should assert the claim by independent action; but in this case the court was not interfering with property of third persons through its receivers. It had required its receivers to take possession of all of the property of the corporation, and the receivers had duly notified the manager at Lovingston of this order. All the property within his possession as manager was the property not of a third person, but of the corporation.

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In section 144 of the authority just quoted, it is said that "the receiver of an insolvent corporation may, by petition in the cause in which he was appointed and without the necessity of an independent suit, procure the transfer and delivery of a note held by officers of the corporation as a part of its assets, even though such officers are not parties to the cause. And when a receiver is appointed over real property, of which the owner is in possession, the proper course is to apply to the court to have the owner deliver possession to the receiver, since the latter cannot distrain upon the owner in possession, as he is not a tenant of the receiver. Such procedure does not conflict with the principle that no man shall be deprived of his property without due process of law, since the surrender to the receiver does not affect the ultimate question of the right to the property, any more than does the levy of an attachment; the purpose being merely to secure the property by getting it into the receiver's possession, so that it may be safely delivered to the party who shall be finally determined to be entitled thereto. And the order for the surrender of property to the receiver may, if necessary, be enforced by process of attachment."

In *Ames* v. *Trustees of Birkenhead Docks,* 20 Beav. 332, it was said: "There is no question but that this court will not permit a receiver, appointed by its authority, and who is, therefore, its officer, to be interfered with or dispossessed of the property he is directed to receive, by any one, although the order appointing him may be perfectly erroneous; this court requires and insists that application should be made to the court for permission to take possession of any property of which the receiver either has taken or is directed to take possession, and it is an idle distinction that this rule only applies to property actually in the hands of the receiver. If a receiver be appointed to receive debts, rents or tolls, the rule applies equally to all these cases, and no person will be permitted,

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without the sanction or authority of the court, to intercept or prevent payment to the receiver of the debts, rents or the tolls, which he has not acually received, but which he is appointed to receive."

In *Ex parte Cohen,* 5 Cal. 494, it is said: "Courts of equity have the power to appoint receivers, and to order them to take possession of the property in controversy, whether in the immediate possession of the defendant or his agents; and in proper cases they can also order the defendants' agents or employees, although not parties to the record, to deliver the specific property to the receiver." And it was further said in that case, that where the parties were served with a rule to show cause why they should not deliver certain property in their possession to the receiver, appointed in a case to which they were not parties, and in obedience to the rule they appeared and contested the matter before the court, that when they appeared and filed their answer to this rule, the court acquired full jurisdiction over their persons as well as the subject matter.

As far as we have proceeded in this case, we are of opinion, as we have already stated, that the bill was a proper one for the appointment of receivers; that they were ordered to take charge of all the assets of the corporation to be administered by the court; that the appellant was duly notified of the appointment of the receivers and their duties in the premises; and that in flagrant disregard of his duty he wrongfully paid over the funds of which he was the custodian, and in so doing was guilty of a contempt of court.

We are further of opinion that the payment of the money in accordance with the terms of the decree, or inability upon the part of appellant to pay it on account of poverty, insolvency or other cause not attributable to any fault of his, should be taken as a satisfaction, and all further proceedings for contempt should be discontinued.

Affirmed.

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Syllabus.

Wytheville

CHESAPEAKE AND OHIO RAILWAY COMPANY v. CHAPMAN.

June 12, 1913.

Absent, Whittle, J.

1. PLEADING—*Variance Between Writ and Declaration—Oyer.*—If an amendment of a declaration at the bar creates a variance between the declaration and the writ the defendant should crave oyer of the writ and move to quash it because of the variance. The writ, in such case, is no part of the record, and the variance could only be disclosed by making it a part of the record by oyer.
2. APPEAL AND ERROR—*Variance—Harmless Error—Code, Sections 3259 and 3260.*—Variance between the writ and the declaration is a matter of abatement only, and the objection cannot be raised for the first time in the appellate court. If the variance is occasioned by an amendment of the declaration at the bar, and is not taken advantage of by plea, motion or otherwise, and no motion is made for a continuance on account of such variance, and the case is heard and decided on the plea of the general issue, it is conclusively presumed that the amendment was harmless. Sections 3259 and 3260 of the code with reference to pleas in abatement do apply and were intended to control in just such cases as this.
3. WITNESSES—*Order of Examination—Appeal and Error.*—The order of the examination of witnesses lies chiefly in the discretion of the trial court, and its exercise is rarely, if ever, to be controlled by an appellate court. It will not be reviewed where no prejudice or injury to the party objecting is shown.
4. INSTRUCTIONS—*Credibility of Witnesses—Weight of Testimony.*—The office of an instruction given by a trial court is to guide the jury as to the law applicable to the case which the evidence tends to prove, and it should be so framed as to leave the jury untrammelled in passing upon the credibility of the witnesses and of the weight to be given to their testimony.
5. EVIDENCE—*Positive and Negative Statements—Weight.*—The positive testimony of a single credible witness that he saw or heard a particular thing at a particular time ought ordinarily to outweigh that of a number of witnesses, equally credible, who, with

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the same opportunities, testify that they did not see or hear it, but where a witness, who denies a fact in question, has as good opportunity to see and hear it as he who affirms it, and his attention, because of special circumstances, was equally drawn to the matter, controverted the general rule that the witness who affirms a fact is to be believed rather than he who denies it does not hold good. The denial of the one in such case constitutes positive evidence as well as the affirmance of the other, and produces a conflict of testimony to be decided by the jury.

6. APPEAL AND ERROR—*Verdicts—Conflicting Evidence—Excessive Damages.*—Where the evidence in a case is conflicting, and the case has been fairly submitted to the jury under proper instructions from the court, and the case is heard in this court, as on a demurrer to the evidence by the plaintiff in error, the verdict of the jury will not be set aside as contrary to the evidence or for excessive damages where there is sufficient evidence to support the verdict. In such case the preponderance of the evidence cannot influence the action of the court in considering a motion for a new trial.

Error to a judgment of the Circuit Court of Orange County in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Browning & Browning and *Henry Taylor, Jr.,* for the plaintiff in error.

Gordon & Gordon and *V. R. Shackelford,* for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This writ of error brings under review a judgment of the circuit court of Orange county in an action brought by defendant in error, Mrs. Josephine M. Chapman, to recover of plaintiff in error, Chesapeake and Ohio Railway Company, damages to growing timber on her lands, oc-

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casioned by fire alleged to have been set out from one of plaintiff in error's engines, operated in running its trains along its tracks between the towns of Gordonsville and Orange, Va.

One count in the declaration is grounded on negligence in setting out the fire, and the other on the statute, which makes a railway company liable in damages for an injury or loss from fire set out by it.

The defendant in error and her husband, Col. Chapman, each own a tract of land lying side by side, and both abutting on the right of way of the plaintiff in error between Gordonsville and Orange, the railway at that point running a little east of north. Each of said tracts of land extend from the railway company's right of way in an easterly and southeasterly direction for about a mile or a mile and a quarter, to and beyond a road known as the Ridge road, running parallel with the railroad through and across the lands of the defendant in error and Col. Chapman, the latter's land lying to the north of the former's.

The theory of defendant in error is that, shortly after the passage of one of the plaintiff in error's trains, running between Orange and Gordonsville, between ten and eleven o'clock on the morning of Wednesday, the 7th day of April, 1909, certain fence posts used to enclose the railway company's track through the lands of Col. Chapman were set on fire, and if this fire was not communicated from the burning posts to his adjoining lands, it was communicated by sparks thrown from one of plaintiff in error's engines into the broom-sedge field of Col. Chapman, and from thence communicated itself to the woodlands of Col. Chapman and from his woodlands to the woodlands of defendant in error, resulting in the damage to her standing trees of which she complains.

On the other hand, plaintiff in error, while not controverting the fact that one of its trains set out the fire which

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burned the broom-sedge field of the "Easton tract" belonging to Col. Chapman and that it is liable to him for whatever damage he has sustained thereby, contends that the fire which reached the lands of defendant in error and caused the damage to her growing trees thereon, for which she sues, was communicated to her lands from a forest fire starting the Sunday night or Monday before in the woods a short distance northeast of Gordonsville, near the point where the De Souroux road intersects the Ridge road, with the origin of which forest fire plaintiff in error had no connection; that this fire continued to burn on Monday and Tuesday preceding the Wednesday of the fire in question and progressed down the Ridge road northerly, on the south side thereof, until it reached the lands of George Goodman and Hugh Goodman; and that it then crossed to the north side of the Ridge road and communicated itself to the lands of George Goodman and Hugh Goodman, and from Hugh Goodman to the lands of Col. Chapman, and from the latter's lands to the lands of defendant in error in the forenoon of Wednesday, April 7, when the alleged damage to her timber was done.

Upon the plea of the general issue, "not guilty," the case was tried, and the jury, after a view of the scene of the fire, and hearing the evidence adduced before them, rendered a verdict for defendant in error (plaintiff below) assessing her damages at $2,500; but the trial court being of opinion that the quantum of damages found by the jury was excessive or not supported by the evidence, though sufficient to sustain the verdict for $1,266.50, put defendant in error to her election either to release and remit the damages assessed by the jury in excess of $1,266.50 or to have the verdict set aside by the court and a new trial granted; thereupon defendant in error, under protest, released and remitted all of the damages assessed by the jury in excess of $1,266.50; whereupon the court over-

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ruled plaintiff in error's motion to set aside the verdict and entered judgment thereon, to which judgment this writ of error was awarded.

The original declaration filed at rules held in the clerk's office of the circuit court on the third Monday in April, 1910, claimed damages to the amount of $1,200, based upon the burning over of about 192 acres of defendant in error's lands, thereby consuming all the growth on the cleared land and the dry leaves and combustible matter upon the woodland, killing, injuring and greatly damaging the growing timber upon the woodland; and after the case had been remanded to rules for a new writ to be issued upon the declaration, which was done, and the case again put on the court's docket for trial, and after subsequent continuances from time to time until the April term of the court, 1912, it was called for trial; whereupon, defendant in error, immediately before the jury was empaneled and sworn to try the issue, asked leave to amend her declaration by inserting at the proper place "422 acres," instead of "192 acres" appearing in the declaration, and by inserting "$2,500.00 damages" in lieu of "$1,200.00 damages" claimed in the declaration, which motion the court, over the objection of plaintiff in error, granted; and thereupon the case went to trial upon the issue joined on the plea of the general issue.

The ruling of the court, permitting the amendment of the declaration just stated, is made the foundation of plaintiff in error's first assignment of error here.

As there was no offer at the time to amend the writ in like manner as the declaration was amended, plaintiff in error contends that the amendment of the declaration produced a variance between the writ and the declaration, and that the judgment of the trial court should be reversed for this cause.

Whether there is a variance between the writ and the

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declaration cannot be judicially determined from the record, since no oyer was craved of the writ for the purpose of making it a part of the record. If the amendment of the declaration produced the alleged variance, plaintiff in error could have craved oyer of the writ for the purpose of making the variance appear, and thereupon, if the variance appeared, moved to quash the writ because of the variance between it and the declaration; but this was not done, and had it been done doubtless defendant in error would have asked and been granted leave to amend the writ in like manner as the declaration was amended, and thus cured the variance. Neither did plaintiff in error move for a continuance of the case, nor did it indicate in any way that it would be surprised or prejudiced in making its defense by permitting the amendment of the declaration, but instead pleaded generally to the declaration as amended, and went to trial. In these circumstances theories of surprise and injury in making its defense, advanced for the first time in this court, can not avail plaintiff in error as a valid reason for reversing the judgment of the trial court complained of. It is true that the objection involved here is not that the writ was illegally issued and executed, but the matter is none the less in abatement only, which was not taken advantage of by plea or demurrer, but issue joined on the case made by the amended declaration, and, therefore, it is to be conclusively presumed that the amendment is harmless and in no manner prevented or hindered plaintiff in error in making full defense to the action. *Tabb* v. *Gregory*, 4 Call (8 Va.) 225.

That the amendment of the declaration objected to was proper in the circumstances disclosed by the record needs no citation of authority. The original declaration gave only a general description of the lands of defendant in error alleged to have been burned over and stated the num-

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ber of acres to be about 192, while the amended declaration gives but a better description of the *locus in quo* burned over by the fire alleged to have been set out by plaintiff in error, an amendment which the court would doubtless have required had objection been made by plaintiff in error that the original declaration was too general in its description of the *locus in quo*.

Sections 3259 and 3260, Code of 1904, do apply and were intended to control in just such cases as this. They are as follows: "In other cases a defendant, on whom process summoning him to answer appears to have been served, shall not take advantage of any defect in the writ or return, or in any variance of the writ from the declaration, unless the same be pleaded in abatement. And in every such case the court may permit the writ or declaration to be amended so as to correct the variance, and permit the return to be amended upon such terms as to it shall seem just."

"Where the declaration or bill shows on its face proper matter for the jurisdiction of the court, no exception for want of such jurisdiction shall be allowed unless it be taken by plea in abatement. No such plea, or any other plea in abatement, shall be received after the defendant has demurred, pleaded in bar or answered to the declaration or bill, nor after a decree *nisi* or conditional judgment at rules."

The error complained of, referring to plaintiff in error's bill of exceptions No. 2, is predicated upon the action of the trial court in permitting over its objection witnesses E. P. Taylor and Col. Chapman, for defendant in error, to testify as to the conformation of the ground where the fire which caused the injury she sued for was alleged to have been set out. This evidence is objected to mainly on the ground that it was admitted at the wrong stage of the trial and was, therefore, "certainly incompetent."

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The question presented goes merely to the order of introducing the testimony, and this court has repeatedly held that the order of the examination of witnesses lies chiefly in the discretion of the trial court, and its exercise is rarely, if ever, to be controlled by an appellate court; and its action in this regard is not reviewable where, as in this case, no prejudice or injury to the party objecting is shown. *Burke* v. *Shaver,* 92 Va. 345, 23 S. E. 749; *Southern Ry. Co.* v. *Stockdon,* 106 Va. 693, 56 S. E. 713; *McIntire* v. *Smith,* 108 Va. 736, 62 S. E. 930.

The third assignment of error is predicated upon plaintiff in error's exceptions Nos. 3 and 4, relating to the admissibility of certain evidence, which assignment is not pressed either in the petition for this writ of error or in the oral argument, and as we think it is clearly without merit it will not be further considered.

The next error assigned relates to instruction No. 1 given for defendant in error, which is as follows: "The court instructs the jury that the positive testimony of a single credible witness that he saw or heard a particular thing at a particular time ought ordinarily to outweigh that of a number of witnesses equally credible, who, with the same opportunities, testify that they did not see or hear it, but the negative statement of a credible witness, who had the same opportunity to see or hear and whose attention, because of particular circumstances, was equally drawn to the disputed point, becomes positive evidence, and it is for the jury to decide between the two views."

In the complaint made by plaintiff in error of this instruction much stress is laid upon its first clause and little, if any, importance is attached to the remaining portion of it. The insistence of counsel for plaintiff in error is that the first part of the instruction invaded the province of the jury in passing upon the weight of the evidence, and that the latter part of the instruction qualifying the lan-

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guage used in the first part of it does not cure the error complained of.

We do not understand the instruction, when read as a whole, as an expression or instruction from the court to the jury as to which theory of the case they should adopt, or to, in any way, trench upon the prerogative of the jury as the exclusive triers of the facts. The office of an instruction given by a trial court to the jury is to guide them as to the law applicable to the case that the evidence tends to prove, and must be so framed that it leaves the jury untrammelled in passing upon the credibility of the witnesses testifying in the case and the weight to be given their evidence.

The instruction here in question has not been directly passed upon by this court, but the rule of law it propounded to the jury, with respect to positive and negative testimony, has been well established in this State and in other jurisdictions.

The opinion of the court delivered by Riely, J., in *Southern Ry. Co.* v. *Bryant,* 95 Va. 212, 28 S. E. 183, says: "It is consonant with reason and human experience that the positive testimony of a single witness, whose credibility is unimpeached, that he saw or heard a particular thing at a particular time and place, ought ordinarily to outweigh that of a number of equally credible witnesses, who, with the same opportunities, testify that they did not see nor hear it. The particular thing might have taken place, and yet from inattention they may not have seen, nor heard it, or, though conscious of seeing or hearing it at the moment of its occurrence, may have afterwards forgotten it from lapse of time or defective memory. In such case, the evidence of the one witness is positive, while that of the many is merely negative. But where a witness, who denies a fact in question, has as good opportunity to see or hear it as he who affirms it, and his attention, because of special

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circumstances, was equally drawn to the matter controverted, the general rule that the witness who affirms a fact is to be believed rather than he who denies it does not hold good. The denial of the one in such case constitutes positive evidence as well as the affirmance of the other, and produces a conflict of testimony."

It is true that the court there was discussing the evidence in the case to reach the conclusion which it did, that the trial court had not erred in overruling the motion to set aside the jury's verdict as contrary to the law and the evidence; still the rule of law and the reason therefor with respect to positive and negative testimony was fully recognized in language very nearly the same as is embodied in the instruction complained of here.

In *Southern Ry. Co.* v. *O'Bryan,* 119 Ga. 147, 45 S. E. 1000, the Supreme Court of Georgia held, that it was not error to charge the jury that positive testimony is rather to be believed than negative, with the qualification that "other things are equal, and the witnesses are of equal credibility." *Railway Co.* v. *Bingham,* 105 Ga. 498, 30 S. E. 934.

The cases of *St. Louis, &c.,* v. *Brock,* 69 Kan. 448, 77 Pac. 86, and *Payne* v. *Delaware, &c., R. R. Co.,* 212 Pa. 143, 61 Atl. 817, are authority for the proposition that where there is positive evidence given by those in charge of a train that the whistle was sounded at a crossing, and negative evidence of those witnesses within hearing that they did not hear it, the court should, on request, call the attention of the jury to the fact that the law gives a preference to positive over negative testimony.

In the case of *Rhodes* v. *United States* (C. C. A.), 75 Fed. 740, it was held not to be error to charge the jury that it is for them to consider how much certain testimony of a negative character is worth as against positive testimony, and that ordinarily the evidence of a witness who swears

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positively that he saw something, is more valuable than that of witnesses who say they did not see it. So in a number of decided cases, among them *Del. L., &c., R. Co.* v. *Devore,* 114 Fed. 155, 52 C. C. A. 77, and *Indiana I. & I. R. Co.* v. *Otstot,* 212 Ill. 429, 72 N. E. 387, it is held that an instruction that positive testimony of witnesses that a whistle was blown and a bell rung is entitled to more weight than testimony of other witnesses that did not hear the one or the other, is not erroneous, provided the instruction contains the qualification that "other things are equal and the witnesses are of equal credibility."

The instruction No. 1 we have before us sets forth clearly the requisite qualification, where the jury are told that the law gives a preference to positive over negative testimony; it instructs the jury as to the law, but does not, as is so earnestly argued, express or intimate an opinion on the part of the court with respect to the weight of the evidence; and we are, therefore, of opinion that there is no error in the giving of the instruction.

Exceptions were taken to defendant in error's instructions Nos. 2, 3 and 4, and a general objection thereto made in the petition for this writ of error, but no error is pointed out in either of these instructions, and as we are unable to discover any they will not be considered further.

The remaining assignment of error relates to the refusal of the trial court to set aside the verdict of the jury because contrary to the law and the evidence, and because of excessive damages allowed.

As has been observed, the question of fact submitted to the jury was, whether the fire which reached and burned over defendant in error's woodland was set out by one of plaintiff in error's trains on the same day, April 7, 1909, or had its origin in the woods a short distance northeast of Gordonsville, starting on Sunday night or Monday next preceding April 7, and spoken of in the record as

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the "forest fire"; the theory of defendant in error being that the fire causing the damage to her property, of which she complains, was set out by plaintiff in error's train running between Orange and Gordonsville, between ten and eleven o'clock on the morning of Wednesday, April 7, while the theory of plaintiff in error is that the "forest fire" starting on the Sunday night or Monday before continued to burn and spread from Monday till Wednesday, communicating itself first to the lands of George Goodwin, second to the lands of Hugh Goodwin, thence to the lands of Col. Chapman, and from the latter's lands to the lands of defendant in error, in the forenoon of Wednesday, April 7.

As is usual in such cases, there is a mass of testimony appearing in the record, much of which is irrelevant, and it is wholly unnecessary for us to attempt to review it in this opinion. Much stress is laid by counsel for plaintiff in error upon the alleged fact that the verdict of the jury must rest mainly upon the testimony given by defendant in error's witnesses, Sam Brown and L. I. Rumsey, who make positive statements as to the origin of the fire on Col. Chapman's lands, and how it continued to burn until it reached the lands of defendant in error Wednesday evening, April 7; while a number of witnesses for plaintiff in error, (though not similarly situated) show that the statements of Sam Brown and Rumsey could not possibly be true. Stress is also laid upon the fact that Rumsey when testifying in this case was himself the plaintiff in another suit against plaintiff in error for the recovery of damages caused by the same fire.

The evidence in the case has been carefully looked to, having due regard for the familiar rule governing its consideration, and we cannot say that the jury's finding of the fact that the fire which caused the damage for which this suit is brought was set out as alleged in defendant in

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error's declaration, is not supported by sufficient evidence; nor would we be warranted in holding that the damages for which the court entered judgment on the verdict with defendant in error's consent are excessive.

The case, as we have seen, was fairly submitted to the jury under the instructions of the court, the evidence throughout was conflicting, and "in such case the preponderance of the evidence cannot influence the action of the court in considering a motion for a new trial. The jury may discard the preponderance of evidence as unworthy of credence, and accept the evidence of a single witness upon which to base their verdict, and upon well settled principles the verdict cannot be disturbed if the evidence of that witness is sufficient, standing alone, to sustain it. Under repeated decisions of this court, the verdict of a jury cannot be set aside unless there is a palpable insuffiency of evidence to sustain it." *Morien* v. *Norfolk & A. T. Co.*, 102 Va. 622, 46 S. E. 907, and authorities cited.

It follows that the judgment of the circuit court here complained of has to be affirmed.

Affirmed.

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Wytheville

CITIZENS BANK OF NORFOLK v. NORFOLK AND WESTERN RAILWAY COMPANY.

June 12, 1913.

1. CONTRACTS—*Guaranty.*—A promise by an assignee "to pay the just freights and demurrage charges on coal covered by this assignment" is a direct promise to pay such freights and demurrage charges and is not merely a guarantee of such payments.
2. CONTRACTS—*Construction—Question for Court.*—Whether, under a written contract which is the ground of action, the defendant is primarily liable for the sum claimed, or merely guaranteed its payment, is a question for the court and not for the jury.
3. WAIVER—*Case at Bar.*—It clearly appears from the evidence in the case at bar, that nothing done or said by the plaintiff was intended to waive, or could have misled any reasonably prudent person into believing that it had waived, its right to demand and recover from the defendant all the unpaid freight and demurrage charges which it undertook and agreed to pay.
4. PRINCIPAL AND AGENT—*Notice to Agent—Estoppel.*—A principal who has directed a carrier to deliver shipments of coal to his agent, and has notice through such agent of the manner in which notice of coal shipments are given, and acquiesces therein during the period of the agency, cannot thereafter object to the sufficiency of the notice because not given in a different manner.
5. RAILROADS—*Demurrage—Interstate Shipments—Rules of Interstate Commerce Commission.*—The evidence in the case at bar shows that the demurrage sued for was on interstate shipments of coal and was based upon rules prescribed by the Interstate Commerce Commission. The cars were upon the terminal yards of the railway company at Norfolk, and the fact that those yards were six miles long and the cars were located at various points on them and not actually on the pier at Lambert's Point furnishes no reason why demurrage should not be paid on those cars for their detention while awaiting the convenience of the consignee, or the arrival of the vessel into which they were to be unloaded.

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Error to a judgment of the Court of Law and Chancery of the city of Norfolk in a proceeding by motion for a judgment under section 3211 of the Code. Judgment for the plaintiff. Defendant assigns error.

Affirmed

The opinion states the case.

J. G. Martin, for the plaintiff in error.

Hughes, Little & Sewell, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

The Norfolk and Western Railway Company proceeded by notice and motion, under section 3211 of the Code, against the Citizens Bank of Norfolk, to recover freight charges and demurrage on coal. There was a verdict and judgment in favor of the railway company. To that judgment this writ of error was awarded.

The court gave two instructions to the jury, upon motion of the railway company, and declined to give three instructions asked for by the bank. This action in giving and refusing instructions is assigned as error.

By instruction No. 1 given for the railway company, the jury were told that the bank in agreeing to pay all just freight and demurrage charges on coal covered by the McRae assignment, became primarily responsible for all such charges, and was liable to the railway company for so much thereof as might be shown to remain unpaid.

It appears that for some time prior to the year 1910 C. J. McRae had been doing business in Norfolk as a coal dealer, handling coal in carload lots consigned to him in various consigning names from mines in the State of West Virginia, and carried by the railway company for transshipment from its piers at Lambert's Point. On the 5th

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of May, 1910, McRae executed an assignment to the bank, as agent of the Consolidated Coal Company, and on the 15th day of June following he executed two assignments to the bank, individually, of all coal that was then or that might be consigned thereafter to him under his consigning names. These assignments, so far as they involve questions for decision in this case, are substantially the same, and by them McRae, for value received, assigned to the bank all cars of coal that were then on the tracks of the railway company either en route to or at Lambert's Point. On the 12th of July following, the railway company acknowledged the receipt of the McRae assignments, and wrote: "We will accept this assignment and deliver such coal on the order of the Citizens National Bank of Norfolk with the understanding and guarantee of the bank that all freight and demurrage charges accruing on such coal will be paid by the bank as presented. Please have the necessary agreement drawn up and executed by the bank."

On the 15th of the same month, the bank wrote to the railway company as follows: "Referring to conversation of yesterday regarding letter from Mr. Spangler accepting the assignment from C. J. McRae to this bank, we write to confirm our agreement to pay the just freights and demurrage charges on coal covered by this assignment and authorize delivery to Mr. C. J. McRae as agent for the bank until notice is given to the contrary."

Pursuant to this agreement, the bank paid freight and demurrage charges on coal shipments covered by the said assignments until October 10, 1910, when it wrote to the railway company terminating the said agreement, to take effect as of the 12th of that month.

There can be no question that by the terms of the letter of the railway company of July 12, and the bank's letter of July 16, the bank expressly undertook and agreed to

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pay all such freight and demurrage charges on the coal covered by McRae's assignments to it, and did not, as the bank insists, merely guarantee such payments. While there had been conversations and communications between the agents of the railway company and the agents of the bank in reference to the matter prior to the letters of July 12 and 16, 1910, those letters evidence the undertaking and agreement of the parties. Whether the bank was primarily liable for such charges or had merely guaranteed their payment as claimed in instruction "A" offered by it, was a question for the court and not for the jury. The court did not, therefore, err in giving instruction No 1 offered by the railway company, or in refusing to give instruction "A" asked for by the bank.

Neither do we think the court erred in giving instruction No. 2 offered by the railway company, nor in declining to give instruction "C" asked for by the bank, which was in conflict with the former.

By the instruction given the jury were told that the delay of the railway company in presenting its final accounts did not constitute a waiver by it of its demand against the bank. That demand consisted of freight and demurrage charges on coal shipped on or before October 12, 1910, at which time the bank by letter terminated, as it had the right to do, its agreement to pay freight and demurrage charges on shipments made thereafter to McRae. That letter is as follows:

"This will notify you that the relations existing between Mr. C. J. McRae and ourselves under an assignment from him to us, a copy of which has been filed with you, by which he assigned all his interest in all coal shipped to him, will be terminated on and after Wednesday, October 12, 1910, and from that date you will please look to Mr. McRae for the payment of all charges due on coal consigned to him. For coal shipped to Mr. McRae covered by said as-

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signment prior to that date we will be responsible for the freight and demurrage charges as heretofore, and will notify your local agent what disposition to make of this coal.

"In order to avoid confusion, we would thank you to send us a statement of the car numbers and their weight, if any, which may be consigned to Mr. McRae before the 12th inst."

In that letter the bank recognizes that it is liable to pay all freight and demurrage charges on coal shipped to McRae prior to that date. In it the bank asked for a statement of the car numbers and weights of coal that were shipped to McRae before the 12th of October, 1910. This letter was received by the agent of the company to whom it was written, and referred to the comptroller of the railway company. On the same day the comptroller, without reference to that letter (and perhaps before it had been received by him) wrote the bank advising of a draft for June demurrage, and calling attention to the fact that the bank had not taken it up with the railway company as suggested in its letter of August 13th. On October 13th the bank returned the draft with the statement that the matter, "is now in dispute," and asked the comptroller to telegraph exactly how much freight the bank was responsible for. This was not done because, as the bank knew, the railway company did not have and could not obtain the information desired until the coal was actually delivered at Lambert's Point. On October 18th the railway company drew on the bank for certain freight charges on coal shipped prior to the 12th of that month, and two days later the bank wrote that it had paid the drafts, and concluded its letter with the statement, that "On the basis of our letters of October 10th and your reply of October 11th, we assume that you have no other charges against us for any coal shipped during the life of the assignment." Upon the receipt of that letter, and on the next day after it was written, the

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comptroller of the railway company wrote: "I will look into the matter, and if there are any additional cars for which drafts should have been made will see that they are drawn for immediately, and will also endeavor to render you formal account as soon as cars covered by these drafts above mentioned are finally disposed of and deliveries made to vessels." On the 2nd of November following the railway company rendered what purported to be the final account and the total amount due to it from the bank for freight and demurrage. On the 7th of that month the bank wrote to the railway company in reply to its letter of the 2nd instant as follows:

"Your letter of the 2nd comes to us as a distinct surprise.

"In regard to the demurrage charge, if it proves to be just, this bank is liable for it, but Mr. McRae declines to admit its correctness, and we feel justified in withholding settlement for same until it is adjusted to his satisfaction, so please take up the matter with McRae and get his 'O. K.' to the claim.

"As to the additional charge of $2,066.56 we cannot admit any responsibility for the reason that it was understood that weekly drafts (which have been promptly paid), covered the freight on all coal as shipped.

"To prevent any misunderstanding, however, after our notice of October 10th that arrangement would terminate on the 12th, we wrote October the 13th requesting you to 'telegraph us exactly how much freight we are responsible for,' to which no reply was received, hence we assumed, as stated in our letter of October 20th, that drafts paid that day of $553.00 and $225.00 covered all outstanding freight charges for which we were liable under the assignment, and therefore released to Mr. McRae the coal then on the tracks amounting to over 5,000 tons, which was duly shipped by him, and we now have no security for any

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additional freight, but we think, if you are able to satisfy Mr. McRae that freight now claimed is due, he will arrange to settle with you."

On the 11th of the month the railway company wrote the bank that in addition to the account rendered on the 2nd instant, there was another item of $633 for demurrage accruing during the month of October. This last item ought to have been included in what purported to be the final account rendered by the railway company November 2nd, but no prejudice, so far as the record shows, resulted to the bank by reason of its omission, for it appears from the bank's statement in its letter of November 7th, and from other evidence in the case, that it had on and prior to the 20th of October preceding released to McRae the coal then on the tracks amounting to over 5,000 tons.

It clearly appears from the correspondence quoted and referred to above, and from the other evidence in the cause, that nothing done or said by the railway company was intended to waive, or could have misled any reasonably prudent person into believing that it had waived, its right to demand and recover from the bank all the unpaid freight and demurrage charges which the bank undertook and agreed to pay under its agreement with the railway company.

By instruction "B" offered by the bank, the court was asked to instruct the jury that demurrage could not be recovered unless the jury believed from the evidence that the railway company notified the bank in writing, or as otherwise agreed by the railway company and the bank (if they believed that there was any other agreement) of the arrival of the cars, and that such notification contained the point of shipment, car initials and numbers and contents. This action of the court in refusing to give that instruction is assigned as error.

On March 12, 1909, Spangler, superintendent of trans-

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portation of the railway company, wrote McRae calling his attention to the fact that some shippers or consignees desired daily notices of arrival of coal by car numbers, while others preferred a notice showing the numbers of cars on hand at Norfolk and the number in transit between Bluefield and Norfolk, and requested him to inform the railway company which of these methods of notice he preferred, and to what address notices should be sent. On the 15th of the same month McRae replied to that letter and stated that giving notice of tonnage already arrived at Lambert's Point and that en route there was preferable, and that such notice to him at Norfolk would be sufficient. This form of notice was thereafter used by the railway company in all its dealings with him, including the period in controversy. By the assignment of McRae to the bank, the railroad company was directed to deliver the coal so assigned to McRae as the bank's agent, which was done. The bank never raised any question or made any objection to the method of giving notice indicated by McRae until after its letter terminating its agreement to pay freight and demurrage charges, but recognized in its letter of November 7, 1910, and otherwise, as appears from the evidence, its liability for the demurrage charge if it proved to be just. The bank through its agent, McRae, had notice of the manner in which notice of coal shipments were given and acquiesced therein during the period the assignments were in force. The court, therefore, properly refused to give the bank's instruction "B," which declared that the demurrage sued for could not be recovered unless notice of shipments of coal was given as indicated in the instruction.

The remaining assignment of error to be considered is the refusal of the court to set aside the verdict of the jury.

The case having been, as we have seen, submitted to the jury without error on the part of the court, the only ques-

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tion upon this assignment of error is, is the verdict sustained by the evidence?

It is contended by the bank that the railway company had no right to charge demurrage until the cars of coal were at Lambert's Point for the delivery of the coal into vessels. It appears that the terminal yards of the railway company extended from Lambert's Point piers to Portlock, a distance of six miles. All coal intended for Lambert's Point piers comes in at the Portlock end of the terminal and is then sent through to the piers as vessels are ready to receive it. Until coal is called for by the consignee, it remains on the terminal yards at any convenient point and demurrage is charged upon interstate shipments (as the coal in this case was) in the manner prescribed by the Intersate Commerce Commission. By rule 1 of that Commission, in force at that point, it is provided that "cars containing coal shipped to Norfolk or Lambert's Point, Virginia, *or* trans-shipment direct to vessels or to be stored for shipment by vessels, when held for or by consignors or consignees for unloading, forwarding directions, or for any other purpose, shall be subject to these rules." By rule 3 it is provided that the date of arrival of car at Norfolk terminals shall be subtracted from the date of the arrival of vessel into which it is unloaded, or from the date the car is otherwise released, and the difference between those dates will constitute the total days detention, and this difference less the free time provided for by another rule constitutes the demurrage time for which $1.00 per car is to be charged for the number of days detention beyond the free time. The evidence showed that the demurrage sued for was based upon these rules. The cars were upon the terminal yards of the railway company at Norfolk. The fact that those yards were six miles in length and the cars were located at various points on them and not actually on the pier at Lambert's Point fur-

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nishes no reason why demurrage should not be paid on those cars for their detention while awaiting the convenience of the consignee or the arrival of the vessel into which they were to be loaded; for under the rules of the Interstate Commerce Commission demurrage charges ceased upon the arrival of the vessel. There is no evidence tending to show that placing the cars at various points on the terminal yards and not at Lambert's Point during the time demurrage was charged in any way prejudiced the bank.

Upon the whole case the court is of opinion that there is no error in the judgment complained of, and that it should be affirmed.

Affirmed.

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Wytheville

CULPEPER NATIONAL BANK AND OTHERS v. WRENN AND OTHERS.

June 12, 1913.

1. DEEDS—*Construction—Intention—Deed to Be Read as a Whole.*—In construing a deed or other written instrument the object is to ascertain the meaning of the parties as expressed in the instrument, and, in ascertaining the purpose and object of the parties, all parts of the instrument must be taken and considered together, and, no matter what the form of the instrument may be, effect must be given to the intent whenever it is clear and free from doubt.

2. DEEDS—*Construction—Granting and Habendum Clauses—Conflict.*—Under the technical common law rule, the habendum clause of a deed yields to the granting clause where there is a repugnance between the estate granted and that limited in the habendum, but this rule has no application where the intention can be ascertained with reasonable certainty from the whole instrument, and no legal obstacle lies in the way of giving effect to such intention.

3. DEEDS—*Construction—Case in Judgment—Fee-Simple—Trusts and Trustees.*—Under a deed conveying land to a trustee for the sole and separate use of W. (a married woman) "during her lifetime and at her death in trust for her children," followed by a provision that "if at any time the said W. shall convey the whole or any part of the said land by deed duly executed according to the laws of Virginia, then the trustee shall thereafter hold the same in trust for such person or persons as may be appointed and directed by such deed or deeds," W. takes a fee-simple estate. The deed is practically a conveyance in trust to W. for life with remainder to her children, unless she should convey the land, and then in trust for such person or persons as she may appoint or direct by such deed or deeds.

Appeal from a decree of the Circuit Court of Culpeper county. Decree for defendants. Complainants appeal.

Reversed.

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The opinion states the case.

Hiden & Thurlow, Gibson & Nottingham and *Waite, Perry & Jeffries,* for the appellants.

Grimsley & Miller, for the appellees.

HARRISON, J., delivered the opinion of the court.

This suit was brought by the appellants to enforce the lien of their judgments against a tract of land alleged to be owned by their debtor, N. J. Taylor. In the progress of the suit the title of the debtor to the property sought to be subjected was questioned, and thereupon an amended bill was filed making the adverse claimants parties defendant. Upon final hearing the circuit court entered a decree holding that N. J. Taylor, the judgment debtor, only owned an estate in the land for the life of Sarah E. Wrenn, and that upon her death the fee simple passed to her children, named as defendants in the amended bill. From that decree this appeal was taken.

The record shows that Isaac Brimmer died some time prior to the year 1868, leaving considerable real estate in the county of Culpeper, and two daughters, Eliza Anne Edwards and Sarah E. Wrenn, as his only heirs at law. By deed dated June 29, 1869, these two sisters partitioned this landed inheritance between them, each of them, together with the husband of Sarah E. Wrenn, uniting in the partition deed. About ten days after this partition deed was executed, Sarah E. Wrenn, her husband uniting, conveyed with general warranty of title one hundred and two acres of the land held by her under such deed to James and Sarah E. Michener, describing it as land which descended to her from her father; and on July 23, 1873, she and her husband conveyed with general warranty of title

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a further tract of one hundred and thirty-seven acres of such land to William H. Payne, as trustee to secure to Samuel B. Worseley $1,500 loaned by him to the grantors, describing the land conveyed as derived from Mrs. Wrenn's father. This tract of one hundred and thirty-seven acres of land was subsequently sold under the trust deed and bought by the creditor, S. B. Worseley, who sold and conveyed the same to N. J. Taylor, and is the land which the appellants now seek to subject in his hands to the satisfaction of their judgments.

The question presented by this appeal involves the proper construction of the deed of partition, dated June 29, 1869, between Sarah E. Wrenn and her sister, Eliza A. Edwards. That deed conveys the land in question to Daniel A. Grimsley in trust "for the sole, separate and exclusive use of Sarah E. Wrenn during her life time, and at her death in trust for her children." The concluding paragraph of the deed, after the metes and bounds are given, is as follows: "And if at any time the said Sarah E. Wrenn shall convey the whole or any part of the said land by deed duly executed according to the laws of Virginia, then the said Daniel A. Grimsley shall thereafter hold the same in trust for such person or persons as may be appointed and directed by such deed or deeds."

In *Temple* v. *Wright,* 94 Va. 338, 26 S. E. 844, it is said: "Every deed is supposed to express the intention of the parties, and however unusual the form may be, it is a primary and cardinal rule of construction, that effect must be given to that intent whenever it is reasonably clear and free from doubt; and in ascertaining the purpose and object of the parties, all parts of the deed must be taken and considered together, it being a rule of law too well settled to need citation of authority that in the construction of any instrument it must be construed as a whole."

This statement of the law has been frequently repeated

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by this court, its latest expression on the subject being found in the case of *Morris* v. *Bernard,* 114 Va. 630, 77 S. E. 458, decided March 13, 1913.

When the deed under consideration is read as a whole, it seems to be clear that in conveying her lands to a trustee the grantor, Mrs. Wrenn, intended to reserve to herself the full and complete power of disposing of the same at her will and pleasure, thus vesting in herself a fee simple estate.

It is, however, contended on behalf of the appellees that the granting clause of the deed conveyed to Mrs. Wrenn only a life estate with remainder to her children, which cannot be taken away by any subsequent provision of the deed.

There is no question as to the technical common law rule relied on by appellees, that the habendum clause of a deed yields to the granting clause where there is a repugnance between the estate granted and that limited in the habendum. That rule has, however, practically become obsolete; it certainly has no application where the intention can be ascertained with reasonable certainty from the whole instrument, and no legal obstacle lies in the way of giving effect to such intention. *Temple* v. *Wright, supra.*

In *Pack* v. *Whitaker,* 110 Va. 122, 65 S. E. 496, it is said, citing Devlin on Deeds: "The purpose of the habendum is to define the estate which the grantee is to take in the property conveyed, whether a fee, life estate, or other interest." Further citing the same author, it is said: "If it appears from the whole instrument that it was intended by the habendum to restrict or enlarge the estate conveyed by the words of the grant, the habendum clause will prevail."

Applying these well settled rules of construction to the deed under consideration, it cannot be doubted that when Mrs. Wrenn exercised her unquestioned right to dispose of

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the property, she conveyed to her grantee a fee simple title. The deed is practically a conveyance in trust to Mrs. Wrenn for life with remainder to her children, unless she should convey the land, and then in trust for such person or persons as she may appoint or direct by such deed or deeds. This language cannot properly be construed otherwise than as giving Mrs. Wrenn a fee in the land passing by the deed. The decree appealed from entirely ignores the clear and explicit intention expressed in the last or habendum clause of the deed and gives effect alone to the granting clause, whereas, as already seen, the purpose of the habendum is to define the estate which the grantee is to take, and must prevail if it appears from the whole instrument that it was intended by the habendum to restrict the estate conveyed by the words of the grant.

It follows from the construction given to the partition deed of June 1869, that N. J. Taylor, the judgment debtor, who holds under Sarah E. Wrenn, has a fee simple title to the land sought to be subjected by the appellants.

The decree appealed from must, therefore, be reversed and the cause remanded for further proceedings not in conflict with the views expressed in this opinion.

Reversed.

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Wytheville

HILL AND OTHERS v. SAUNDERS AND OTHERS.

June 12, 1913.

1. EVIDENCE—*Absolute Deed a Mortgage—Presumption.*—While a deed absolute on its face may be shown to be a mortgage, the settled doctrine in this tSate is that the presumption is that the deed is what, upon its face, it purports to be, and to overcome this presumption the evidence must be clear, unequivocal and convincing.
2. EQUITY—*Laches.*—Courts of equity refuse relief to parties who, with conscious knowledge of the situation, have chosen to sleep on their rights until all of the principal actors in the transaction have passed away, and when, from the loss of evidence any conclusion that the court might reach would necessarily be conjectural and founded upon random guess rather than upon any just ground of belief based upon sufficient proof, a just determination of the controversy between the parties would be impossible. In such cases the courts leave the complaining parties where their inexcusable negligence has placed them.

Appeal from a decree of the Circuit Court of Culpeper county. Decree for the defendants. Complainants appeal.

Affirmed.

The opinion states the case.

Grimsley & Miller, for the appellants.

Rixey & Hiden, Waite, Perry & Jeffries and *Thos. E. Blakey,* for the appellees.

WHITTLE, J., delivered the opinion of the court.

The bill in this case was filed by the widow and heirs of

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Edward B. Hill, deceased, (who was the former claimant of two farms in Culpeper county, known respectively as the Petty farm, containing 630 acres, and the Lightfoot farm of 378½ acres) against the personal representatives and devises of C. A. Saunders, deceased. The object of the suit was to have certain deeds absolute on their face, conveying these properties to Saunders, declared to be mortgages; also for an account of indebtedness of the estate of Hill to the estate of Saunders; and upon such settlement that complainants should be allowed to redeem the farms, or that they should be sold and the balance of the purchase money, after discharging the indebtedness, paid over to them. From a decree dismissing the bill this appeal was granted.

Stated generally the history of the case is as follows: Edward B. Hill resided with his family, consisting of his wife and four children, at Culpeper, Virginia; and shortly after the Civil war he engaged in the mercantile business at that place as a member of the firm of Hill, Burdette and Company. C. A. Saunders married Hill's sister, and lived in the city of New York, where he was engaged in buisness. He was a man of the highest integrity, of exceptional business ability and large means. His brother-in-law, Major Hill, was on the contrary a poor business man, and in straitened financial circumstances. The social relations between the two families were extremely intimate and cordial; and the personal relations between Saunders and Hill were as close and affectionate as if they had been brothers. A room was reserved at the Hill home for Saunders and his wife, and they annually spent their summer vacations in Culpeper as boarders in the household. The mercantile venture of Hill, Burdette and Company proved unsuccessful, and ultimately resulted in disastrous failure. During the continuance of the business, Hill frequently called upon Saunders for financial assistance, and

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when the collaspe finally came in 1875, Saunders had loaned him and the concern large sums of money without security.

In the year 1860 Hill purchased at a judicial sale the Petty farm at $12.65 per acre, the entire price being $8,526.10. He made the cash payment of $252.11, but when he was called on after the war to pay the balance of the purchase money he was wholly unable to do so. In that emergency he again appealed to his benefactor for help. Saunders, in reply to Hill's letter, wrote under date of June 1, 1875, among other things: "I said before I do not want the property and will re-deed it as soon as my debt is paid, and will give my obligation to that effect, and will at once try to buy the other interests in it and get the court title perfect, so that it can be sold if an opportunity offers." At that time the place was supposed to contain valuable iron ore deposits, which in point of fact was afterwards discovered to be unfounded.

These negotiations resulted in Saunders becoming the substituted purchaser of the Petty farm. On August 10, 1875, Hill and wife conveyed to him all their interest in the land by deed with general warranty of title; but several years elapsed before Saunders acquired the outstanding interests in the property referred to in his letter and received a deed from the commissioners.

From time to time, Hill made other calls on Saunders, as his necessities required, which amounted in the aggregate, including the purchase price of the Petty farm, to over $20,000, or nearly three times the value of the land at the date of Saunders purchase. In other letters exhibited with the record, he iterated his position with respect to these transactions, emphasizing the fact that he had no desire at that time to own the land and was willing to re-convey it to Hill upon his returning the money advanced.

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In 1859, Hill purchased from Edward Lightfoot the tract known as the Lightfoot farm, and executed six bonds for $1,250 each for the purchase money, secured by a deed of trust upon the land. Hill was unable to meet this liability; and in response to his earnest appeal, Saunders, on July 30, 1889, paid the purchase money, amounting to $13,351.56, and D. A. Grimsley, substituted trustee, and E. B. Hill united in a deed conveying to Saunders the Lightfoot farm, the deed reciting that the consideration was the payment of the amount of the lien theron, and that Hill was "anxious to pay off and discharge the whole of said debt so due to Saunders . . and for this purpose has agreed to sell and convey" the land to him. The amount paid was more than the value of the property at that date.

Throughout these dealings Hill was hopelessly and continuously insolvent, and at no time ever paid or offered to pay the large sums of money advanced by Saunders at his request. Saunders in the meantime, paid the taxes on both farms, leaving Hill in full possession and permanency of the profits (which indeed constituted his only means of support), and this arrangement continued until Hill's death in February, 1890, his widow receiving the rents for that year. At the close of the year 1890 the family had become dispersed, the two sons were living and in business out of the State; both daughters were married and residing in Baltimore; and their mother spent much of her time with them. Mr. Saunders, as the recognized owner, took possession of the farms without suggestion or objection from any quarter. His possession and absolute claim of ownership was well known to appellants and continued without challenge or adverse claim on their part until after his death in 1905. During the fifteen years of his actual occupancy he spent large sums of money in the cultivation and improvement of these properties, increasing their value fifty *per cent.*, with-

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out taking into account the general advance in the price of land. He bought fifty odd acres adjoining the Lightfoot farm to straighten his boundaries; and, moreover, farmed and erected permanent improvements upon both properties upon an extravagant scale, using tile for draining, and inclosing the farm with wire fences on locust posts. Among other improvements, he erected five large elegantly built barns on the Lightfoot place, and a six-room dwelling on the Petty farm. In fine, his expenditures and betterments were of a class that no prudent man would have made upon property other than his own.

Year after year these outlays continued, with full knowledge on the part of appellants, all of whom were adults and one a practicing lawyer; yet they never paid or offered to pay a dollar to redeem the lands, nor intimated by word or act their ultimate purpose to lay claim to the estate, until they filed this bill eighteen years after the death of their father, thirty years after the deed to the Petty farm, nineteen years after the deed to the Lightfoot farm, and three years after the death of C. A. Saunders.

It is sometimes difficult to determine whether a deed absolute on its face is in reality a conditional sale or a mortgage, but in all such cases the settled doctrine in this jurisdiction is that the presumption that the deed is what it purports to be must be overcome by clear, unequivocal and convincing evidence. *Holliday* v. *Willis,* 101 Va. 274, 278, 43 S. E. 616; *Bachrach* v. *Bachrach,* 111 Va. 232, 234, 68 S. E. 985.

Without regard, however, to what may have been the original merits of this controversy, and without discussing any of the other matters of defense, the decree of the circuit court is obviously right and must be affirmed on the ground of gross laches on the part of the appellants in asserting their claim. With conscious knowledge of the situation, they have chosen to sleep on their rights until all

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of the principal actors in the transactions have passed away. Hill and wife, Saunders and wife, and Grimsley, trustee, are all dead, and from the loss of their evidence any conclusion that the court might reach would necessarily be conjectural and founded upon random guess rather than upon any just ground of belief based upon sufficient proof. In such case a court of equity invariably denies relief for the reason that a just determination of the controversy or settlement between the parties is impossible, and, therefore, leaves the complainants where their inexcusable negligence has placed them. *Nelson* v. *Triplett,* 99 Va. 421, 39 S. E. 150; *Doyle* v. *Beasley,* 99 Va. 428, 39 S. E. 152; *Redford* v. *Clark,* 100 Va. 115, 40 S. E. 630.

For these reasons the decree of the circuit court must be affirmed.

Affirmed.

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Wytheville

HOLLADAY v. MOORE.

June 12, 1913.

1. BILLS OF EXCEPTION—*Contents—Excluding Answer of Witness.*—Where exception is taken to the ruling of the trial court refusing to permit a witness to answer a question, the bill of exception must show what answer was expected of the witness, else the appellate court cannot tell whether or not the witness had any knowledge on the subject or the question was relevant or material. The same rule applies to questions on cross-examination as to questions in chief.
2. EJECTMENT—*Outstanding Legal Title—Plaintiff's Title.*—An outstanding legal title in another, whether that other be a stranger, the Commonwealth or the defendant, will defeat a recovery by the plaintiff in an action of ejectment. A plaintiff in ejectment must recover upon the strength of his own title, and to this rule there are few exceptions.
3. EJECTMENT—*Outstanding Legal Title—Nature of.*—An outstanding title in another to defeat an action of ejectment must be a present, subsisting and operative legal title upon which the owner could recover if asserting it by action.
4. EJECTMENT—*Plaintiff's Title—Peaceable Possession.*—Prior peaceful possession by the plaintiff in ejectment or those under whom he holds, claiming to be the owner in fee, if proved, is *prima facie* evidence of ownership and seizing, and is sufficient to authorize recovery unless the defendant shall show a better title in himself or another, such as is described in paragraph 3 above.

Error to a judgment of the Circuit Court of Prince Edward county in an action of ejectment. Plaintiff assigns error to a judgment for a less amount of land than he claimed.

Reversed.

Instructions 3 and 4 offered by the plaintiff, but *rejected* by the court were as follows:

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(3) The court instructs the jury that an outstanding title in another to defeat an action of ejectment must be present, outstanding, operative and available legal title on which the owner could recover against the other contending party if asserting it by action.

(4) The court instructs the jury that prior peaceful possession by the plaintiff or those under whom he holds, claiming to be the owner in fee, if proved, is *prima facie* evidence of ownership and seizin and is sufficient to authorize a recovery unless the defendant shall show a better title and in the case at bar, if the jury shall believe from the evidence that R. L. Dabney conveyed to Richard McIlwaine, the tract of land in the plaintiff's declaration mentioned on the first day of August, 1884, and admitted to record May 26, 1885, and that Richard McIlwaine was in possession of said tract of land up to the 22nd day of Dec. 1908, and then conveyed the property to W. M. Holladay, the plaintiff, and that W. R. Moore did not receive title to his property until the day of September, 1891, and admitted to record Jan. 21, 1892, and that there was no record evidence of the conveyance by R. L. Dabney to W. R. Moore or to Margarette V. Hannah; then they must find for the plaintiff.

The following instructions were given by the court on the motion of the plaintiff:

No. 1. The court instructs the jury that in questions of boundary, natural objects called for, marked lines and reputed boundaries well established, visible monuments such as water courses and the like, between two tracts of land, should be preferred to calls and distances of the grant.

No. 2. The court instructs the jury that the question in this case is not how would an accurate survey locate the lots in question, but how did the original survey and plat locate them. The only purpose of the evidence of the sur-

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veyors who have made the recent surveys is to enable the jury to locate the original boundary, if possible, and not for the purpose of determining where they ought to have been, or where they would have been by an accurate survey.

No. 5. The court instructs the jury that if they believe from the evidence that the plaintiff has proven a good legal title to the land in controversy, either from the Commonwealth or from a common source, to which the defendant traces his title or has proven either in himself or his grantors continuous, open, notorious, visible, peaceable and adverse possession for fifteen years under claims of title of said land here in controversy; then they must find for the plaintiff.

The court also gave the following instructions on the motion of the defendant:

(1) The court instructs the jury that the burden in the case is upon the plaintiff, Holladay, to prove to the satisfaction of the jury that he had a complete legal title to the premises claimed by him, and the right to the possession thereof at the institution of this suit, before he can recover, and that he must recover, if at all, on the strength of his own title, and cannot rely on any weakness of the title of the defendant, and that in order to recover, he cannot rely merely upon a comparison between himself and the defendant, but must prove affimatively, that he is entitled to the premises and that the defendant is not entitled before a recovery can be had.

(2) The court instructs the jury that the plaintiff cannot recover by showing a conflict of claims between himself and the defendant, but he must show affirmatively by a preponderance of evidence that his claim to the premises is positive, valid and complete, as the possession of the defendant of the premises claimed is valid against everyone except a plaintiff proving a superior title.

(3) The court further instructs the jury that adverse

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possession consists of a claim made by the party relying upon such claim accompanied by a denial of the rights of all other persons to said premises. That the cultivation of the land and paying taxes thereon, and the use made of said property are only incidents in determining whether such adverse claim has been made in good faith by the party so claiming it, and that no specific acts of cultivation or use of said property is necessary to constitute said adverse claim, and if the jury believe from the evidence that the defendant, Moore, has made such adverse and continuous open, visible and notorious claim, for a period of fifteen years prior to the beginning of this suit, to all or any part of the strip of land in controversy, under color of title, as occasion required, and has claimed the same as occasion required, that such acts are sufficient to constitute his right to the premises so claimed under color of title.

(4) The court instructs the jury that adverse possession for a period of fifteen years under color of title confers a complete legal title upon the party possessing for that period, as if his title were derived by descent, will or deed, and if they believe from the evidence in this case that the defendant Moore has held adverse, continuous, visible, open and notorious possession of the premises claimed by Holladay or any part thereof, under color of title, for a period of fifteen years, that such possession vests the title in Moore of the premises so held as effectively as would a deed to same.

(5) The court instructs the jury that before the plaintiff, Holladay, can recover the premises claimed in this suit, he must show by a preponderance of evidence the identity of the land claimed, accurately as to exterior boundaries, and that he can recover no part of the premises claimed until he proves affirmatively the specific boundary by metes and bounds of the part so claimed, and if the jury believe

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from the evidence in this case that the plaintiff, Holladay, has failed to prove his full and legal title to any specific part of the premises claimed by accurate metes and bounds, they must find for the defendant.

(6) The court instructs the jury that in arriving at their verdict in this case, they are to consider all maps and surveys introduced before them, as well as all parol evidence, and if they believe from the evidence and all circumstances of the case that the plaintiff, Holladay, has failed to prove a complete legal title with right of possession to all or any specific part of the premises claimed, to the satisfaction of the jury, that they must find for the defendant.

Watkins & Brock, for the plaintiff in error.

J. Taylor Thompson and *Richard H. Mann,* for the defendant in error.

KEITH, P., delivered the opinion of the court.

This was an action of ejectment brought to recover a parcel of land described. Upon the trial, the jury found a verdict in favor of the plaintiff, and the court rendered judgment for about one-half of the premises claimed by the plaintiff; and thereupon the plaintiff applied for and obtained a writ of error.

The first assignment of error is based upon bill of exceptions No. 1, from which it appears that the plaintiff, in order to prove the issue joined on his part, asked the defendant, a witness in his own behalf, on cross-examination, "How far do you trace your title back under those whom you claim?" and "Did I understand you to say in your examination in chief that you claimed title under your deed from Mrs. Hannah and R. M. Venable, trustee?"

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These questions were objected to by counsel for defendant, and the objection was sustained; but the bill of exceptions does not show what answer the witness gave to the questions, or would have given had he been permitted to answer by the court.

In *Taylor* v. *Commonwealth,* 90 Va. 109, 17 S. E. 812, it is said, that an assignment of error in refusing to allow a witness to answer a certain question is unavailable in the appellate court where the record fails to show what the answer would have been.

In *Brock* v. *Bear,* 100 Va. 562, 42 S. E. 307, it is said: "Where a question is asked a witness which he is not permitted to answer, and exception thereto is taken, the bill of exception must show what the party asking the question expected to prove, else the appellate court cannot tell whether or not the witness had any knowledge on the subject, or the question was relevant or material."

In *American Bonding & Tr. Co.* v. *Milstead,* 102 Va. 683, 47 S. E. 853, this court held that although counsel may explain the object of the question so far as to show its materiality, the ruling of the trial court refusing to permit the witness to answer will not be considered unless the bill of exceptions shows what was expected to be proved by the witness; and that the same rule applies to questions on cross-examination as to questions in chief.

The same ruling has been made in numerous other cases in this court, but the citations made are deemed sufficient.

The first assignment of error is overruled.

When all the evidence for the plaintiff and the defendant had been put before the jury, the plaintiff in error, who was the plaintiff in the court below, asked for five instructions, of which the court gave numbers one, two and five, and refused to give numbers three and four. At the instance of the defendant the court gave six instructions, which were unexcepted to; but the plaintiff excepted to

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the refusal of the court to give instructions three and four, and this ruling is set forth in bill of exceptions No. 3.

It is true that an outstanding legal title in another, whether that other be a stranger, or the Commonwealth, or the defendant, will defeat an action of ejectment; but a plaintiff in ejectment must recover upon the strength of his own title, and to this rule there are few exceptions, none of which appear in the case before us.

In *Reusens* v. *Lawson,* 91 Va. 226, 21 S. E. 347, this court said that an outstanding title sufficient to defeat a recovery in an action of ejectment must be a present, subsisting and operative title upon which the owner could recover if asserting it by action.

In *Merryman* v. *Hoover,* 107 Va. 485, 59 S. E. 483, the same doctrine is thus stated: "An outstanding legal title in another than the plaintiff, at the time of the institution of an action of ejectment, breaks in upon and disrupts the plaintiff's paper title and bars his recovery. Nor can the plaintiff make good the defect by the subsequent purchase of such outstanding title."

"A defendant in ejectment may rely upon an outstanding legal title in the Commonwealth at the time of the institution of the action, and thereby defeat the plaintiff."

We think the third instruction states a sound proposition of law, and that the evidence was such as to make it proper that it should have been given to the jury.

The fourth instruction should also have been given. The jury might well have inferred from the evidence adduced on behalf of the plaintiff in error the prior peaceful possession of the plaintiff, or those under whom he claims, of the land in the declaration mentioned, unless the defendant could show a better title in himself or another, such as is described in instruction No. 3.

We are, therefore, of opinion that the circuit court erred in refusing instructions Nos. 3 and 4.

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We do not deem it proper to indicate any opinion upon the evidence, further than it was necessary to do so in order to pass upon the propriety of the instructions.

The case must be reversed and remanded for a new trial not in conflict with the views expressed in this opinion, at which trial, if the evidence should be substantially such as was adduced upon the former trial and instructions Nos. 3 and 4 are again offered, they should be granted.

Reversed.

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Wytheville

HUFF, EXECUTOR, AND OTHERS v. WELCH.

June 12, 1913.

1. WILLS—*Testamentary Capacity—Test.*—If, at the time of the execution of a will, a testator has sufficient mind and memory to intelligently understand the nature of the business in which he is engaged, to comprehend generally the nature and extent of the property constituting his estate and which he wishes to dispose of, and to know and to recall the objects of his bounty, and the manner in which he wishes to distribute his property among them, this is all the mental capacity needful to the execution of a valid will. If these requisities exist the will should be upheld although the testator was of great age and his mind enfeebled, his body debilitated and his memory not as good as formerly, especially where he has not abandoned his former and usual interest in his business affairs, and is capable of understanding and looking after them.
2. WILLS—*Testamentary Capacity—Opinions of Witnesses—Witness of Factum.*—Expressions of opinion by witnesses that the testator was not competent to make a will based upon facts which do not sustain the opinion are not to be considered as conflicting with the evidence of the witnesses of the factum who speak of the testator's condition immediately at the time of the execution of the paper in question, and who united in the unqualified statement that when the paper was executed by the testator his mind was clear and good, and that he fully comprehended what he was doing.
3. APPEAL AND ERROR—*Verdicts—Plainly Wrong—Wills.*—Where the mental capacity of a testator is involved on the trial of an issue *devisavit vel non*, the jury are the proper judges of the weight and credit to be given to the testimony of the witnesses, and their verdict, when sanctioned, as in the case at bar, by the trial court, is entitled to the highest respect in the appellate court, but when there has been a plain and palpable deviation from the proof, interference on the part of the appellate court is warranted.

Appeal from a decree of the Circuit Court of Rappahan-

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nock county. Decree for the complainants. Defendants appeal.

Reversed.

The following instructions were given by the Court:

A. The jury are instructed that neither sickness, old age, nor impaired intellect nor all of them combined are sufficient, standing alone, to render invalid a will and even if the jury believe from the evidence that any one or more or all of these conditions existed in the case of the testator, Edward H. Huff, when he executed his will in question, and even though the jury shall believe from the evidence that the testator at the time of executing the said will was of advanced age or was infirm in health, and even though they may believe from the evidence that his intellect was impaired to some extent, nevertheless, if they shall further believe and find from the evidence that at the time of executing the said will, the said Edward H. Huff was capable of recollecting the property he was about to dispose of, the persons who were the objects of his bounty and the manner in which he wished his property distributed among them, and had an understanding of the nature of the business in which he was engaged, then the jury must find that he had legal capacity to make a valid disposition of his estate.

B. The court instructs the jury that although Edward H. Huff may have made oral declarations prior to the execution of his will to parties who were in no way interested in his property or affairs that he would leave his property to M. J. Welch or the children of M. J. Welch, or other parties than the parties named in said will, the said Edward H. Huff was in no way bound by such declarations and he had the right to change his mind at any time prior to the execution of said will, and if the jury believe from the evidence that the said Edward H. Huff at the time of the execution of the said will knew what property

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he had and to whom he wished to leave it, they must sustain the will of the said Edward H. Huff.

C. The court instructs the jury that it is not necessary that a person should possess the highest qualities of mind in order to make a will, nor that he should have the same strength of mind which he formely may have had; the mind may be in some degree debilitated, the memory may be enfeebled, the understanding may be weak, and the testator may be wanting in capacity to transact many of the ordinary affairs of life, but it is sufficient if he possess mind enough to understand the nature of the business in which he is engaged in making his will has a recollection of the property he wishes to dispose of thereby, knows and recalls the object of his bounty, and the manner in which he wishes to distribute his property among them.

D. The court instructs the jury that every person over twenty-one years of age and of sound mind is entitled under the law to make a will and to dispose of his property as he pleases and to dispose against or among his next kin as he may choose, or if he choose he may even leave his property to strangers.

O. While the burden of proof is upon those offering a will for probate, to show testamentary capacity on the part of the testator at the time the will was executed to the satisfaction of the jury, yet the court tells the jury that there is in all cases an existing presumption in favor of the testator's sanity and capacity, which is to be taken into consideration by the jury in determining the question of competency.

P. The court instructs the jury that the testimony of credible witnesses present at the execution of the will is entitled to peculiar weight on the question of testamentary capacity and that this is especially true of attesting witnesses whose duty it is to ascertain and judge of the testator's mental capacity at the time.

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H. The court instructs the jury that they cannot measure the testator's capacity nor inquire into the wisdom and prudence of his disposition of the property if the jury believe from the evidence that he is legally *compos mentis*, be he wise or unwise, he is the disposer of his own property and his will stands as a reason for his action. He is under no legal obligation to will his property to his relations, the justice or propriety of the will is not a question for the jury except that they may consider that matter as a circumstance bearing upon the testator's mental capacity. If he is a capable testator he can will his property as he chooses.

Q. The court instructs the jury that for the testator to be mentally capable of making a valid will, or to be of testamentary capacity, it is sufficient if at the time of executing said will the testator had an understanding of the nature of the business in which he was engaged, a recollection of the property he meant to dispose of, of the persons who were the objects of his bounty, and the manner in which his property was to be distributed among them. It is not necessary, however, that the testator should *actually* recall or recollect all of his property. It is sufficient if he was at the time of executing the will mentally capable of doing so; it is not necessary that he should have comprehended the provisions of his will in their legal form; it is sufficient if he fully comprehended it and understood at the time of execution of said will the actual disposition which he was thereby making or intended to make of his property.

The jury are further instructed if they shall believe from the evidence that at the time of executing said will the mind and memory of the testator was sufficiently sound to enable him to know and understand the extent and amount of his property and his relations to the objects of his bounty, and the business in which he was engaged, then he

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was of sound mind and memory within the meaning of the law and they must find for said will.

R. The court instructs the jury that a testator must have testamentary capacity to make a will at the time at which such will is executed, and if the jury shall believe from the evidence that Edarwd H. Huff was mentally capable of making a will upon the date of its execution, the same is valid whatever may have been his condition mentally either prior or after the time of executing said will.

1. The court instructs the jury that the burden is upon the proponents of the will in this case to establish that the paper writing in question offered as the last will and testament of Edward H. Huff, deceased, is the true last will and testament of the said Edward H. Huff, and to do so they must establish to your satisfaction the following facts:

First, that the paper offered in evidence, and the whole paper, was thoroughly understood by the said Huff and intended by him to be his last will and testament;

Second, at the time of the writing and signing thereof the said Huff was of sound and disposing mind and memory;

Third, that the said paper writing was signed or acknowledged by the said Huff in the presence of John H. Updike and C. H. Keyser, the subscribing witnesses thereto both present, and in the presence of the said E. H. Huff at the same time, and that said subscribing witnesses subscribed the will in the presence of the testator Edward H. Huff.

2. The court further instructs the jury that one of the issues involved in this contest is whether the decedent, Edward H. Huff, possessed sufficient mental capacity to make a will on the 31st day of January, 1910, at the time the paper writing offered in evidence in this case was ex-

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ecuted; and the jury are now told that the test of testamentary capacity is that the testator must have had sufficient mind and intelligence at the time the paper writing was executed to understand:

First, the nature of the business in which he was engaged;

Second, to recollect the property he was attempting to dispose of; to know and understand his relation to his blood kin or to others who might have claims upon him, and to determine the objects of his bounty, and the manner in which he wished to dispose of his estate with sense and judgment.

And if the jury believe that the decedent did not at the time the alleged will was executed possess mental capacity to know and understand these things, then they must find against the will.

3. The court further instructs the jury that in determining whether or not the paper writing in question is the true last will and testament of the decedent, Edward H. Huff, the jury has the right to consider the nature and character of the will, and if they find from the evidence that it is contrary to natural justice, they should take that fact into consideration along with the other facts and circumstances in the case, and the testimony of the witnesses in determining the question of capacity.

4. The jury are further instructed that testamentary incapacity does not necessarily require that a person shall actually be insane. Weakness of intellect, regardless of how it may arise, may render the testator incapable of making a valid will, provided such weakness really disqualifies him from knowing or appreciating the nature, effect and consequences of the act he is engaged in.

5. The court further instructs the jury that direct proof is not necessary to overthrow a will, but any facts and circumstances are sufficient as evidence that will satisfy

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the jury of the incapacity of the testator to make testamentary disposition of his property at the time of the execution of his will.

James F. Strother and *Hiden & Thurlow,* for the appellants.

Keith & Richards, Grimsley & Miller and *H. G. Moffett,* for the appellee.

CARDWELL, J., delivered the opinion of the court.

The purpose of this suit is to contest the will of Edward H. Huff, deceased, which had been admitted to probate in the circuit court of Rappahannock county; the bill attacking the validity of the will being filed by M. J. Welch, a nephew of the testator. The grounds upon which it is claimed that the paper writing in question is not the last will and testament of the deceased are: (1) It was not executed and witnessed as required by law; (2) The said Edward H. Huff did not have testamentary capacity sufficient to execute said paper purporting to be his last will; and (3) Undue and improper influence exercised over the said Edward H. Huff by Lucy Phillips and some of her adult children, beneficiaries named in the paper writing purporting to be his last will.

There was an issue out of chancery to determine the questions raised by the pleadings, and the first trial thereof resulted in a mistrial and at the second trial the jury rendered a verdict finding that the paper writing in question was not the true last will and testament of the said Edward H. Huff, deceased, which verdict the trial court refused to set aside and entered its decree ratifying and confirming the finding of the jury, from which decree the plaintiffs in the issue obtained this appeal.

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The objection of the appellee to the sufficiency of the record with respect to the certification by the trial court of the evidence, founded upon an error in copying the record, has been met by the certification of the clerk of an addendum to bill of exceptions No. 2, purporting to set forth the evidence, and, therefore, said objection will not be further considered.

It appears that Edward H. Huff died in Rappahannock county on the 10th day of February, 1910, after nine or ten days of illness, at the age of seventy-eight years, and that the paper writing in question was executed by him on the date therein stated, to-wit, the 31st day of January, 1910, and was afterwards duly probated as his last will and testament, whereby he bequeathed all of his personal property to his brother, W. J. Huff (spoken of in this record as John Huff), and devised his real estate, consisting of an undivided half interest in a tract of land known as the "Huff Place," to said John Huff for life, and then to the ten living children of Lucy Phillips and to the ten living children of Anna Robinson, deceased, each of the ten living children of Lucy Phillips (all of whom are named by the testator) "to take one eleventh of my said undivided interest in said real estate and the children of Anna Robinson, deceased, one eleventh part; I leave the said children of Lucy Phillips and the children of Anna Robinson, deceased, my interest in the said real estate after the death of my said brother, W. J. Huff, because they the said Lucy Phillips and her children have been faithful servants to me; Having heretofore deeded to my nephew, Mortimer Welch, my interest in the Holtzman place, it is my desire that he have no part of my estate."

The fact that the children of Lucy Phillips are John Huff's children is not questioned. Neither the said testator nor John Huff ever married, and their only sister, Columbianna Welch, died some years ago, leaving sur-

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viving her a husband, Aldrich Welch, and a son, M. J. Welch, spoken of in this record as "Malt" Welch, and who is the contestant of said will in this ligitation. It further appears from the record that some time before the civil war Edward and John Huff and their sister, Columbianna Welch, inherited the "Huff Place," subject to an incumbrance securing a debt of about $1,800, and that they lived upon and held the said property in common for many years; that during the time Edward Huff, a skilled stone mason, followed his vocation, while John Huff was engaged in the huckstering trade about the country, their earnings going into the common or partnership fund; that Aldrich Welch and the boys of John Huff and Lucy Phillips ran the place, and the grown girls, also the children of John Huff and Lucy Phillips, together with the latter attended to the house work; that by these united efforts the debt of $1,800 on the "Huff Place" was paid off and later another piece of property, known as the "Holtzman Tract," was purchased, and that in 1892 Edward and John Huff had a division with Columbianna Welch whereby the "Holtzman Tract" was deeded to her as her share of the joint estate, and she and her husband moved over to the "Holtzman Tract," while Edward and John Huff never had a division between themselves, but continued to live upon the "Huff Place" and to hold it and all of their property as joint owners.

It further appears that Lucy Phillips and her children, or some of them, lived on the "Huff Place" with Edward and John Huff for at least fifty years, during which time neither Lucy Phillips nor any of her children ever received any compensation for their labor and service; that Lucy Phillips and her children always deported themselves kindly and attentively towards Edward and John Huff, nursing them in sickness and looking after their welfare and comfort when they grew old and feeble, Lucy Phillips and three of her children being with Edward continuously

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during his last illness, while a fourth came from the State of Ohio to see him before his death. It further appears that all these children of John Huff and Lucy Phillips are of good character and were at all times attached—in fact devoted—to both Edward and John Huff and they to them, as evidenced in part by the fact that Edward and John Huff gave to each of the boys a horse and to each girl a cow when they left the "Huff Place," and gave dances and marriage parties for them, "Malt" Welch being also tendered and accepted a "home-bringing" at the "Huff Place" on the occasion of his marriage; and in these environments the said testator, Edward Huff, as seems to be conceded, lived his life out, satisfied with his surroundings, of which he, of course, had full knowledge, yet made no protest against them. On the other hand it appears, and equally as clearly, that between Edward and John Huff and "Malt" Welch and his family, in later years, there was but little intercourse, and that during the last illness of Edward Huff "Malt" Welch, who had not been at the "Huff Place" for several years, visited him but two or three times, rendering little or no service in looking after the welfare or comfort of the sick man, but this duty, so far as he was concerned, was left to devolve upon Lucy Phillips and her children, and was faithfully performed. While Edward Huff, according to "Malt" Welch's own statement, was able to and did attend church regularly and to visit neighbors as late as November or December next before his death, he had not visited the home of "Malt" Welch for more than two years.

The will which is here attacked was written by Charles H. Keyser, a practicing and reputable lawyer of good standing, as seems not to be questioned, and he testified in this case that when he arrived at the home of the testator the latter told witness that he wanted him to draw his will; that the testator ate dinner with witness and

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others at the table and went outdoors at least once that day; that no one was present during the drawing of the will except witness and the testator; that testator gave the necessary instructions, dictated the names of the beneficiaries, and detected an error in the will as first drawn; that the will was then redrawn and the error which the testator detected eliminated; that in the mean time Wade Massie and John Updike were sent for to witness the will, but after learning the disposition of the property Massie requested to be excused from becoming a witness to the will, because he thought it likely there would be a contest over it and he did not want to get mixed up in a law suit; that testator then signed the will in the presence of Keyser, the draughtsman of it, and John Updike, who subscribed the same as witnesses; that testator was then sitting in an invalid's chair, reclining slightly, and again when referring to the disposition he had made of his property stated that that was the way he wanted it to go, and that if he had paid Lucy Phillips' children for the work they had done it would amount to much more than he was giving them in his will.

Keyser, Updike and Massie, the witnesses of the factum, all testified, being the only witnesses in the case who could speak of the testator's condition immediately at the time of the execution of the paper in question, and they unite in stating, without qualification, that when the will was executed the testator's mind was clear and good; that he fully understood the transaction and all about what he was doing; Massie stating not only that the testator was fully capable of making his will, but he told witness then and there "that that was his will; that that was the way he wanted his property to go," and urged him (Massie) to witness the will, and Massie's only reason for not doing so was that "he feared there would be contest by the Welches" and he "did not want to be bothered with having to testify in a suit."

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Will Rowles, another white neighbor of the testator, and also of high standing, who talked with the testator shortly after dark on the day his will was written and executed, testifies that the testator was fully capable of making a will on that day if he had thought it over before, and stated certain facts gathered from the testator as to the reasons which had prompted him in preferring to dispose of the property as he had done; and that he recognized witness and "talked intelligently."

The trial court gave to the jury an instruction, not objected to, that there was no evidence in the case to support the issue of undue influence, and in reaching their conclusion they should eliminate that question, and the charge that the paper writing in question was not executed and witnessed as required by law has been practically abandoned in this court; so that the real issue presented is, whether or not the evidence warranted the finding of the jury with respect to testamentary capacity of the testator.

The testimony offered to sustain the charge of mental incapacity is that of a number of witnesses who claimed to have known the testator well and who express the opinion that he was not competent to make a will, which evidence when analyzed discloses that the opinions of the witnesses are based only on the circumstances that the testator was old (78 years of age), rather feeble, and his memory not as good as formerly, as evidenced by his being at times unable to recall the names of persons whom he had known for years, or the name of a place or places with which he had been familiar, or on eccentric acts or expressions gathered at different times from testator's whole life. None of the witnesses say that the testator had abandoned his former and usual interest in his business affairs, or was incapable of understanding and looking after them, or did not have knowledge of his property or was incapable of selecting the subjects of his bounty when he came to de-

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termine to whom he would prefer to will his property; in fact, the unconflicting testimony in the case is that the testator attended to his ordinary business affairs up to the time of the execution of his will and later, and was at the time his will was executed of sufficient intelligence to understand the nature of the business in which he was engaged, to recollect the property that he wished to dispose of, to know and recall the objects of his bounty, and the manner in which he wished to distribute his property among them.

The plaintiffs in the issue (appellants here) asked for ten instructions to the jury, all of which were refused, and in lieu thereof the court gave fourteen instructions, designated respectively as A, B, C, D, O, P, H, Q, R, 1, 2, 3, 4 and 5, to which refusal to give appellants' instructions and the giving of the instructions of the court marked 1, 2, 3, 4, 5, O, H and P the appellants excepted.

The instructions given by the court, all of which appear in the statement preceding this opinion, were ample to submit to the jury fully and fairly the case which the evidence adduced tended to prove, and we are, therefore, of opinion that the court committed no reversible error in its rulings with respect to the instructions refused or to those given.

"The law requires, in determining mental capacity, not so much of any particular character or intellect as the ability to make certain efforts of the mind and memory. The rule of testamentary capacity is that the testator must have sufficient mind and memory to intelligently understand the nature of the business in which he is engaged, to comprehend generally the nature and extent of the property which constitutes his estate, and which he intends to dispose of, and to recollect the objects of his bounty. If he possesses these attributes he has testamentary capacity. The testator need not have the same perfect and complete

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understanding and appreciation of these matters, in all their bearings, as a person in sound and vigorous health of mind and body would have; nor is he required to know the precise legal effect of every provision made in his will. Absent-mindedness or mere intellectual feebleness does not disqualify a person to make a will, as the feeble have as much right to dispose of their property as the strong, but something short of insanity is sufficient to invalidate it. One capable of transacting ordinary business is presumed capable of making a will although not of sound mind." 40 Cyc. 1004, and authorities cited.

At page 1108 the same authority says: "If the testamentary requisites are found the will may be valid, although executed by one of great age whose mind is enfeebled, whose body is debilitated, whose memory is failing, and whose judgment is vacillating, especially where the will is fairly made and apparently emanating from a free will, or where testator was a good business man; but not where an aged person is so enfeebled mentally as not to understand what he is doing, as when he is suffering from hallucinations or paralysis or softening of the brain."

"The law prescribes no limit in point of age beyond which a person cannot dispose of his property. A man eighty-nine years of age is often as capable of making a deed or will as at any other period of his life. The greatness of his age is not proof of mental incapacity." *Howard* v. *Howard,* 112 Va. 566, 72 S. E. 133.

The authorities have not undertaken to prescribe any particular degree of mental acumen as the measure of one's capacity to execute deeds or wills, but all agree that the test is whether the party had at the time of the execution of the instrument sufficient capacity to understand the nature of the transaction he was entering into, and to assent to its provisions. *Wampler* v. *Harrell,* 112 Va. 635, 72 S. E. 135.

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In *Jarrett* v. *Jarrett,* 11 W. Va. 584, the court, in discussing whether or not a grantor in a deed had mental capacity at the time of its execution, said, with respect to the weight to be given evidence upon the question of mental capacity, that the evidence of witnesses present at the execution of the deed is entitled to peculiar weight, and that the mere opinions of witnesses not experts are entitled to little or no regard, unless they are supported by good reasons founded on facts which warrant them; and if the reasons and facts upon which they are founded are frivolous the opinions of such witnesses are worth but little or nothing.

In the recent case decided by this court, *Woody et al* v. *Taylor et al,* 114 Va. 737, 77 S. E. 498, the opinion by Harrison J., in disposing of strikingly similar testimony to that offered in this case to sustain the charge of mental incapacity of the testator to make a will, says: "They (the witnesses) express the opinion that he was not competent to make a will, but, as was said in *Beverly* v. *Walden,* 20 Gratt. (61 Va.) 147, this is their opinion, but when we come to analyze their evidence we find that their opinions are not justified by the facts upon which they are based."

In *Beverly* v. *Walden,* 20 Gratt. (61 Va.) 147, the opinion by Christian, J., says: "In such case the testimony of witnesses present at the *factum,* and the written acts of the party attesting his capacity, are more to be relied on than the mere opinions of other witnesses, based upon facts which may be true yet not the result of unsoundness of mind." *Porter* v. *Porter,* 89 Va. 118, 15 S. E. 500.

Expressions of opinions by witnesses that the testator was not competent to make a will based upon facts which do not sustain the opinions are not to be considered as conflicting with the evidence of the witnesses of the factum who speak of the testator's condition immediately at the time of the execution of the paper in question and unite in the un-

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qualified statement to the effect that when the paper was executed by the testator his mind was clear and good, and that he knew all about what he was doing. *Woody* v. *Taylor, supra.*

It is very true that in such cases as this the proper judges of the weight and credit due to the testimony of the witnesses are the jury, and their verdict, when sanctioned, as in this case, by the trial court, is entitled to the highest respect in the appellate court, but when there has been a plain and palpable deviation from the proof, interference on the part of the appellate court is warranted. *Young* v. *Barner,* 27 Gratt. (68 Va.) 96.

We have here the clear and positive testimony of not only the two attesting witnesses of the will, but that of Wade Massie and of Will Rowles, two reliable neighbors, as well as that of Hugh Phillips who lived with the testator up to the time of his death, as to the capacity of the testator to make a will, none of which testimony conflicts with any evidence introduced by the contestant of the will; moreover, there is other unconflicting evidence adduced by appellants, the proponents of the will, plainly showing a memory consistent with the testator's age, and a capacity to understand his business affairs and to direct their management, not only up to the date of his will, but after, and practically to the last of his life.

We are of opinion that the verdict of the jury complained of is a plain and palpable deviation from the proof in the case, and, therefore, the decree of the circuit court appealed from has to be reversed, the verdict of the jury set aside, and the cause remanded for further proceedings therein not in conflict with the views expressed in this opinion.

Reversed.

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Wytheville

JACOT V. GROSSMANN SEED AND SUPPLY CO., INC.

June 12, 1913.

Absent, Cardwell, J.

1. APPEAL AND ERROR—*Instructions—Sufficiently Instructed.*—Where the instructions given by the court are sufficient to inform the jury as to the law applicable to the facts of the case, it is unnecessary for this court to review the action of the trial court in rejecting other instructions tendered.
2. SALES—*Sale by Sample—Acceptance of Inferior Goods—Warranty—Waiver*—Upon an executory sale of goods by sample, with a warranty that the goods shall correspond with the sample, the acceptance of an inferior grade of goods after an opportunity for examination does not, as a matter of law, constitute a waiver of the inferior quality of the goods and a satisfaction of the seller's obligations, but the retention and use of the goods for a considerable length of time, without complaint, warrants a strong inference that the goods are either what the contract calls for, or that the buyer is satisfied to accept them instead of such goods, and for this reason it is important to give prompt notice of any defect which exists.
3. DAMAGES—*Delivery of Inferior Goods.*—Where goods of an inferior grade have been delivered to a buyer, the measure of his damages is the difference between the value of the goods as represented at the time and place of delivery, and the value at such time and place of the goods actually delivered.
4. WARRANTY—*Affirmation of Quality—Sales.*—Although there is no warranty of the germinating properties of seed offered for sale, yet if the affirmation is made that they are of the crop of the previous year for the purpose of influencing the buyer, as an affirmation of quality, and the affirmation is relied on by the buyer, and the evidence shows that seed of good quality of that year's crop are good, merchantable seed, then the fact that the seed had practically no germinating qualities strongly tends to prove that they were not of the crop of the previous year, and that there was a breach of the affirmation or warranty that they were of that year's growth, and the verdict of the jury so finding should not be set aside as contrary to the evidence.

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Statement.

Error to a judgment of the Hustings Court of the city of Petersburg in a proceeding by motion for a judgment for money. Judgment for the defendant. Plaintiff assigns error.

Affirmed.

The following instructions were tendered by the plaintiff but were *refused.*

"1. The court instructs the jury that they must not consider in this case for any purpose any alleged statements as to the clover seed in question made by Werner prior to or at the time of the written bid for acceptance signed by Grossmann, and that none of these alleged statements are to be considered as part of the evidence in this case."

"2. The court instructs the jury that if they believe from the evidence that the 120 sacks of crimson clover seed were actually received by Grossmann during the latter part of January or first part of February, 1911, and that the said Grossmann did not, within a reasonable time after the receipt by him of said 120 bags of seed, inspect the same, then the said defendant accepted the seed and waived any defect, if any there was, in said seed, and the jury shall not consider as evidence in this case any of the statements made by witnesses as to the failure of the seed to sprout or germinate when sowed in the ground in July, 1911, or later, or as to any tests made in September, 1911, or later."

"3. The court instructs the jury that they must find for the plaintiff the amount claimed by him, unless they believe from the evidence that the said plaintiff gave to the said defendant, the Grossmann Seed and Supply Company, a warranty, either express or implied, as to the germination of the crimson clover seed sold by the said plaintiff to the said defendant, and unless they further believe that the seed so sold by the said plaintiff to the said defendant did not comply with the said warranty."

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"4. The court instructs the jury that warranties are either express or implied. Any distinct affirmation of quality made by the vendor, or by his thereunto duly authorized agent, at the time of the sale, not as an expression of opinion or belief, but as an assurance to the purchaser of the truth of the fact affirmed, and an inducement to him to make the purchase, is, if accordingly received and relied on, and acted on by the purchaser, an express warranty. But no affirmation, however strong, will constitute a warranty unless it was so intended, and none of the statements alleged to have been made by Werner prior to or at the time of the signing of the bid for acceptance are to be considered as evidence in this case."

"5. The court instructs the jury that if they believe from the evidence that Werner gave to the defendant at the time of the sale any warranty as to the germination of the seed in question, still the plaintiff is not bound by such warranty unless the said Werner, as agent for the plaintiff, had authority to make such warranty. The court instructs the jury that the said Werner had no authority to warrant the germination of said seed, so as to make the plaintiff liable therefor, unless he had been expressly authorized by the plaintiff to make such warranty, or unless, by a custom or usage of the seed trade, it is usual and customary in selling crimson clover seed to warrant its germination."

"6. The court instructs the jury that the plaintiff cannot be held liable for the failure of the seed to germinate unless there was a warranty on the part of the plaintiff, as one of the terms of sale, that the seed would germinate, and further instructs the jury that the statements made by the plaintiff, after the sale was consummated by the acceptance by the plaintiff of the offer of the defendant, and contained in the letters of January 18, 19, and 28, 1911, do not constitute a warranty binding the plaintiff."

"7. The court instructs the jury that if they believe from

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the evidence that the Grossmann Seed and Supply Company signed the written bid for acceptance introduced in evidence, and if they further believe that the plaintiff, by the telegram of September 16, and by the letter of September 17, accepted the offer made by said defendant, that this offer, telegram and letter contain every material term and circumstance of the contract, and these three papers constitute the entire contract, and the court further instructs the jury that there is not in the said contract between the plaintiff and the defendant any warranty as to the germination of the crimson clover seed sold."

"8. Where a specific article, such as crimson clover seed, sample "calm," of the 1910 crop, is ordered and furnished, the court instructs the jury that, although the defendant stated the purpose to which he intended to apply the seed, there is no implied warranty on the part of the plaintiff that it is suitable for the purpose, and he will not, in the absence of an express warranty, be held liable, however unfit and defective the seed may turn out to be."

"9. The court instructs the jury that if they believe from the evidence that the sale of the crimson clover seed in question here was a sale by sample, and if they further believe that the 120 bags of crimson clover seed came into the actual possession of the defendant on or about the 9th of February, 1911, then the court instructs the jury that it was the duty of the said defendant, then or within a reasonable time thereafter, to inspect the 120 bags of clover seed, in order to ascertain whether the bulk of the seed corresponded with the sample by which the seed were purchased by the defendant; and the court further instructs the jury that if they believe from the evidence that the defendant did not, within a reasonable time after the receipt by it of the 120 bags of clover seed in question, inspect the same, that the defendant cannot now complain of any alleged failure of the bulk of the seed to be equal in quality to the sample by which the seed were purchased."

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"10. The court instructs the jury that if they believe from the evidence that the sale in this case was a sale by sample and that the 120 bags of crimson clover seed in question came into actual possession of the defendant on or before the 9th of February, 1911, then the court instructs the jury that it was the duty of the defendant, within a reasonable time, to inspect the said 120 bags, so as to determine whether the bulk of the seed corresponded with the sample by which the seed were purchased; and the court further instructs the jury that if the defendant, by such inspection, made within a reasonable time, ascertained that the bulk of the seed did not correspond with the sample by which the seed were purchased, then it was the duty of the defendant either to reject the seed for nonconformity with the sample or, within a reasonable time, to notify the plaintiff of the failure of the bulk of the seed to correspond with the sample, and that his failure to do either will estop him to claim any damage for any defect that may be found in the seed after the expiration of a reasonable time to make such examination."

"11. The court instructs the jury that if they believe from the evidence that 120 bags of crimson clover seed, of the 1910 crop and of the same grade as the sample exhibited to Grossmann by Werner, were weighed, set aside and marked in the Lackawanna Warehouse Company's storehouse in Jersey City, N. J., and the warehouse receipt exhibited in evidence sent to and received by the defendant, and the said clover seed delivered f. o. b. to the transportation company in New York, this was a delivery to said defendant of said clover seed, and the statute known as the Virginia seed law has no bearing on this case."

"12. If the seed in question were branded and shipped to Petersburg by the plaintiff at the request of the defendant, then the plaintiff was, as to such branding and shipment,

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the agent of the defendant, and the branding and shipping were in contemplation of law, the acts of the defendant."

"13. The court instructs the jury that the evidence does not show that the business of the Grossmann Seed and Supply Company has been injured by the sale of the seed to it by the plaintiff."

"14. The court instructs the jury that under the act of Assembly of Virginia known as the Virginia Seed Law crimson clover seed which are ninety-eight per cent. pure may lawfully be labelled "Standard Seeds."

"15. The court instructs the jury that if the defendant shall have in his exclusive possession evidence to sustain a certain fact, if the fact exists, and if he fails to produce such evidence, the presumption is that the fact does not exist, and the court instructs the jury that if the defendant claims that the 120 bags of clover seed when shipped into Virginia had on them tags marked "Standard Seed," and fails to produce before the jury either a tag or a bag so branded, this failure, unexplained, raises a presumption that the bags were not so branded, which presumption the defendant must overcome."

INSTRUCTIONS GIVEN BY THE COURT.

I. This is an action by the plaintiffs, Jacot & Mullen, to recover of the defendant, the Grossmann Seed and Supply Company, Inc., the sum of $1,700.00 with interest from September 11, 1911, due by negotiable note—it being claimed that said note was given for the balance of the purchase price on account of 120 sacks of crimson clover seed sold the defendant by the plaintiff in September, 1910.

The defendant seeks to defeat said recovery upon the ground that said seed were sold as the crop of 1910 and by sample, and it avers that said seed were not of the crop of 1910, or of the quality of the sample by which the sale

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was made; but, on the contrary, were of an older crop, of an inferior quality, and sterile and utterly worthless, by reason of which the defendant has sustained great loss and damage to the amount of $3,000.42, and prays that the same be set off and allowed against the sum of money alleged to be due and payable to the plaintiff.

II. The court further instructs the jury that if they believe from the evidence that the defendant signed the written bid or offer to buy introduced in evidence and that the plaintiff by telegram of September 16th, and by letter of September 17, 1910, accepted said bid or offer, and a sample of the seed sold was, at the time of said bid, exhibited to the defendant by plaintiff's agent, as representing the kind and quality of seed offered, then said written bid, telegram, letter and sample constitute the contract of sale between the plaintiffs and the defendant, and no representation or recommendation made the defendant at the time by plaintiff's agent, can vary, take from or add to its force or effect.

III. The court further instructs the jury that the contract between the plaintiffs and defendant contains no warranty of the quality and germinating properties of the seed sold, except an implied warranty that they were of the kind and quality set out in the contract and as shown by the sample; and that they must not consider any evidence or statement of any witness as to the failure of said seed to sprout or germinate, except as evidence tending to show what was the quality or condition of the seed when delivered as compared with the quality of the seed sold with reference to the sample by which the sale was made.

IV. The court further instructs the jury that the letters of the plaintiffs to the defendant, of January 18, 19 and 28, 1911, do not constitute any warranty, and must not be considered in that light, but can only be considered by the jury as evidence tending to show what was the quality

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of the goods the plaintiffs understood had been sold as shown by the sample.

V. The court further instructs the jury where a specific article, such as crimson clover seed, of the grade "calm," and of the crop of 1910, is sold and bought, there is no warranty, express or implied, that they are suitable for the purpose for which they are purchased, although the seller may have known the purpose to which the buyer intended to apply them; and, in the absence of an express warranty, the seller will not be held liable, however defective the seed may turn out to be.

VI. The court further instructs the jury that if seed are sold by description and by sample, no warranty of quality or fitness for a particular purpose is implied, except that when they are described as of a particular grade, and of a particular crop, a warranty that they are of such grade and crop is implied; and where there is a sale by sample, there is an implied warranty that the bulk of the seed is equal to the sample in kind and quality. A sale by description and sample carries with it an implied warranty that the seller shall deliver seed of the kind and quality of such description and sample.

VII. The court further instructs the jury that if they believe from the evidence that the seed sold the defendant in September, 1910, were, at the time they were weighed, set aside and marked in the Lackawanna Warehouse Company's Store-house in Jersey City, New Jersey, of the crop of 1910, and of the same grade and quality as the sample exhibited by plaintiff's agent to the defendant, then the jury should find for the plaintiffs and against the defendant.

VIII. The court further instructs the jury if they believe from the evidence that the seed so weighed, set aside and marked were not of the crop of 1910, but were older seed, and of an inferior grade and quality to the sample,

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then the jury should find for the defendant and against the plaintiffs.

IX. The court further instructs the jury that if they find for the plaintiffs, the amount of their recovery should be the sum of $1,700.00 with interest from September 11, 1911.

If the jury find for the defendant, the measure of its damages is the difference in the value of the seed at the time of delivery in February, 1911, at Petersburg, if they had been of the kind and quality of the description and sample by which they were sold, and the value at such time and place of the seed actually delivered, but such amount cannot exceed $3,066.42, the sum claimed by the defendant's plea.

From the amount so ascertained by the jury must be deducted the sum of $1,700.00, the difference being the amount to which the defendant is entitled, if the jury should find for the defendant."

Roper & Davis, for the plaintiff in error.

Wm. B. McIlwaine, for the defendant in error.

KEITH, P., delivered the opinion of the court.

William Jacot, trading as Jacot & Mullen, made a motion for judgment in the hustings court of the city of Petersburg against the Grossmann Seed and Supply Company, Inc., to which the defendant pleaded the general issue and four special pleas, in the first of which it is alleged that the defendant had purchased of the plaintiff a quantity of crimson clover seed, which the plaintiff undertook and promised the defendant should be good merchantable seed, which proved not to be true, and that the clover seed were sterile and utterly worthless, to the dam-

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age of the defendant. The second plea sets out that the defendant bought of the plaintiff a quantity of standard crimson clover seed of the quality of a sample then and there exhibited by the plaintiff's agent, who undertook that the seed purchased should be of the quality of the sample then and there exhibited, and that by the breach of this undertaking the defendant has suffered damages. The third plea states that the plaintiff undertook that the seed purchased should be good, merchantable and up to the standard of germination and purity required by the statute of Virginia in such case made and provided, and that by the breach of this undertaking the defendant had suffered damages; and the fourth special plea alleges that the plaintiff undertook and promised that the seed purchased were good and merchantable seed, and of such power of germination as to be suitable for sale and planting during the summer of 1911, and that by the breach of this undertaking damages were sustained.

The jury found the issue for the defendant and assessed its damages at the sum of $3,066.42, less a credit of $1,700, and to a judgment on that verdict this writ of error was awarded.

The facts in evidence are as follows: On September 16, 1910, Werner, the agent and salesman of William Jacot, went to the office of the defendant in the city of Petersburg and exhibited to Grossmann, the president of the defendant corporation, an envelope containing a sample of seed which he proposed to sell, on the back of which was printed the words: "Standard Sample. Preserve for Reference. Crimson Calm Clover Seed From Jacot & Mullen, Seed Merchants, No. 1 Water Street, New York." The words "Crimson Calm" appear to have been placed on the envelope in a blank space left for the purpose with a rubber stamp or stencil, all the other words being printed, and the word "Calm" indicated the grade of the seed, the

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plaintiff having several grades of crimson clover seed, that known as "Calm" being the lowest grade. The sample having been examined by Grossmann, the president, and Ivey, the secretary and treasurer of the defendant corporation, they determined to purchase some of the seed if a satisfactory price and terms could be agreed upon, and in pursuance of this determination there was prepared by Werner and signed by the defendant corporation a written bid for acceptance. Said bid for acceptance is in the words and figures following:

"BID FOR ACCEPTANCE.

Order No. .....
Messrs. Grossmann Seed & Supply Co.:
Ship to Petersburg, Va.
At.....
How Ship: O. D. When: As below.
Terms: As below.

120 bags each, about 220 lbs., 1910 crop Crimson Clover Seed, at $6.75 per bushel of 60 lbs., f. o. b. New York, payable by your 120 days' note, to be dated Oct. 1st, 1910; goods to be carried in warehouse in New York or New Jersey; buyers to have warehouse receipt; insurance to be covered by Jacot & Mullen.

"JACOT & MULLEN,
Per C. H. Werner.

One-half collection charges to each party.
Grossmann Seed & Supply Co.
Interest 6% from Oct. 1st."

This offer was accepted by Jacot & Mullen by telegram, which is in the words and figures as follows:

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"New York, Sept. 16, 1910.
Grossmann Seed & Supply Co., Petersburg, Va.:
Accept your bid made Werner. Will confirm tomorrow mail.
JACOT & MULLEN."

And on the next day they confirmed the telegram by letter. The sample of seed exhibited was not left with the defendant for the reason that it was the only sample the salesman had and he did not know whether the defendant's bid would be accepted, but on September 21, 1910, invoice for the seed was forwarded to defendant in a letter in which it is stated that another sample drawn from the lot of seed sold to the defendant was being mailed to it, but it does not appear that this sample was ever received by the defendant.

On the invoice for the seed enclosed in the letter of September 21, the following note was written across the face: "We do not guarantee any of the seeds sold in this bill, nor will we be responsible for the crop therefrom. If not accepted on these conditions they must be returned at once" and it appears that this statement was read at the time by the president of the defendant corporation.

In pursuance of this contract of sale 120 bags of crimson clover seed were set aside and marked in the Lackawanna Warehouse, Jersey City, N. J., and a negotiable warehouse receipt for said seed, issued by the Lackawanna Warehouse Company on September 26, 1910, was forwarded to the defendant. The warehouse receipt was enclosed in a letter as follows:

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"New York, Sept. 26, 1910.

"Messrs. Grossmann Seed & Supply Co.,

"Petersburg, Va.

"Gentlemen:

"We beg to enclose herewith warehouse receipt for the 120 sacks of Crimson Clover Sample Calm, as we agreed to send you, and also an acceptance at 120 days from Oct. 1st, which we will ask you to accept and return to us.

"Very truly yours,

"JACOT & MULLEN."

On October 4, 1910, the defendant forwarded to the plaintiff an acknowledgement of said warehouse receipt and its note for the sum of $2,970, dated October 1, 1910, and payable 120 days after date, in settlement for the seed. This note was subsequently curtailed and renewed at various times, until September 11, 1911, when, payment being refused by the defendant upon the last note given it was protested, and the present suit instituted, which resulted, as we have seen, in a judgment for the defendant by which it recovered back all that it had paid by reason of the transaction.

About the first of February, 1911, the defendant, the Grossmann corporation, sent the warehouse receipt to plaintiff and requested him to ship the seed, and the seed were shipped via the Old Dominion Steamship Co. and the N. & W. Ry. Co. and were received by the defendant in Petersburg on February 9, 1911, and stored by the defendant in its warehouse in said city.

It appears that in the summer of 1911 and up to September 20, 1911, nine days after the last note had been presented, the defendant proceeded and continued to sell these seed to its customers in the counties around Petersburg, and, although the seed were in the actual possession of the defendant, in the city of Petersburg, after February

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9, 1911, and although the defendant could at any time after said date have inspected the seed, it was not until after September 9, 1911, after the note given in payment had several times been curtailed and renewed, and after practically all of the seed had been sold by it, that the defendant claimed that the seed were not of the quality of the sample exhibited when the sale was made.

There was evidence showing that the seed was well cared for in the warehouse at New Jersey and after it was delivered to the Grossmann Company in February, 1911, and from this evidence the jury had the right to infer that there was no deterioration in the quality of the seed between September, 1910, and September, 1911, except such as was inevitable from the efflux of time; but it is also shown in evidence that it was the rule to buy seed of the crop of 1910 for sale to be used in the season of 1911, and that this was understood by all parties: and further that the quality of the seed, if properly cared for, would not be seriously impaired within that time. There was evidence that when the sample was exhibited to Grossmann Company by Werner, the agent of the plaintiff in error, it was carefully examined by expert seedsmen and found to be of good quality in all respects. It further appears that the seed, when sold to farmers, failed to germinate; that there was general complaint made, as a result of which, after due investigation, Grossmann Company refunded a large sum of money to those to whom the seed had been sold, and that they have undertaken to make restitution to all who purchased crimson clover seed from them.

The first error assigned is because the court permitted the witnesses Grossmann and Ivey to testify with regard to representations alleged to have been made by plaintiff's agent Werner as to the seed sold, prior to and not contained in the written contract in regard to the sale of said seed which had already been introduced in evidence.

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We do not think that in any view of the case the ruling of the court constitutes reversible error, as the instructions which the court gave plainly informed the jury that the contract under investigation contained "no warranty of the quality and germinating properties of the seed sold, except an implied warranty that they were of the kind and quality set out in the contract and as shown by the sample, and that they must not consider any evidence or statement of any witness as to the failure of said seed to sprout or germinate, except as evidence tending to show what was the quality or condition of the seed when delivered as compared with the quality of the seed sold with reference to the sample by which the sale was made."

After the evidence was placed before the jury, the plaintiff asked for fifteen instructions, all of which the court refused to give. We shall not undertake to deal with these instructions *seriatim*, as it could not be done in an opinion of reasonable length. The instructions given by the court were sufficient to inform the jury as to the law applicable to the facts. The trial court was of opinion that the only warranties of the seed sold by the plaintiff to the defendant disclosed by the evidence were, that the seed were of the crop of 1910 and of the quality of the sample exhibited and examined at the time of the sale, and upon these two propositions we think the jury were correctly instructed.

The second and ninth instructions asked for by the plaintiff in error and refused by the court present the question upon the solution of which this case depends.

No. 2 is as follows: "The court instructs the jury that if they believe from the evidence that the 120 sacks of crimson clover seed were actually received by Grossmann during the latter part of January or first part of February, 1911, and that the said Grossmann did not, within a reasonable time after the receipt by him of said 120 bags of seed, inspect the same, then the said defendant accepted

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the seed and waived any defect, if any there was, in said seed, and the jury shall not consider as evidence in this case any of the statements made by witnesses as to the failure of the seed to sprout or germinate when sowed in the ground in July, 1911, or later, or as to any tests made in September, 1911, or later."

And instruction No. 9, also refused by the court, is as follows: "The court instructs the jury that if they believe from the evidence that the sale of the crimson clover seed in question here was a sale by sample, and if they further believe that the 120 bags of crimson clover seed came into the acutal possession of the defendant on or about the 9th of February, 1911, then the court instructs the jury that it was the duty of the said defendant, then or within a reasonable time thereafter, to inspect the 120 bags of clover seed, in order to ascertain whether the bulk of the seed corresponded with the sample by which the seed were purchased by the defendant: and the court further instructs the jury that if they believe from the evidence that the defendant did not, within a reasonable time after the receipt by it of the 120 bags of clover seed in question, inspect the same, that the defendant cannot now complain of any alleged failure of the bulk of the seed to be equal in quality to the sample by which the seed were purchased."

In 2 Mechem on Sales, section 1395, it is said: "The express warranty, therefore, stands upon different ground in reference to acceptance from that occupied, according to many authorities, by the implied warranty or condition; and it is well settled where an express warranty accompanied the contract, that while, by accepting the goods, the buyer may lose his right to subsequently reject them, he does not thereby necessarily lose his right to rely upon the warranty. The express warranty survives acceptance, and, by the great weight of authority, gives the buyer a

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remedy notwithstanding the defects were visible or open to discovery at the time they were received. The buyer may reject them, but he is not compelled to do so: he may retain them and rely upon the warranty."

In *Zabriskie* v. *Central Vermont R. Co.*, 131 N. Y. 72, 29 N. E. 1006, it is said: "Upon an executory sale of goods by sample, with warranty that the goods shall correspond with the sample, the vendee is not precluded from claiming and recovering damages for breach of warranty, although he has accepted the goods after an opportunity for inspection."

In *Holloway* v. *Jacoby*, 120 Pa. St. 583, 15 Atl. 487, 6 Am. St. Rep. 737, the buyer had paid for the goods (corn) in advance; on receipt he found it defective; he kept it and sold it on the best terms he could, giving no notice to the seller until after the sale, and two months after receipt. He then brought an action for damages on the warranty, and was held entitled to recover.

In *Minnesota Thresher Mfg. Co.* v. *Hanson*, 3 N. D. 81, 54 N. W. 311, the court said: "The retention and use of the property, without notice (to the seller) of defects, under the great preponderance of the later, and as we think better, authorities, affects only the right to rescind. The buyer may still rely upon the breach of warranty to defeat a recovery, in whole or in part, in an action brought by the seller to recover the purchase price. Continued use of the property, with knowledge of defects, and without notice or complaint to the seller, may be more or less persuasive as evidence of waiver of defects, but cannot establish such waiver as matter of law."

See Williston on Sales, sections 488 and 489, where the rule is stated that "acceptance of title does not, as matter of law, indicate a waiver of claims for inferior quality of the goods, is supported by a large number of decisions in this country, and is the unquestioned law of England."

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We are of opinion that this view is supported by the better reason as well as by authority, but that while the merely taking of title to the goods does not warrant the conclusion that the buyer has agreed to take them in full satisfaction of all the seller's obligations, the retention and use of the goods for a considerable period without any complaint warrants a strong inference that the goods are either what the contract called for, or that the buyer is satisfied to accept them instead of such goods; and that for this reason it is important to give prompt notice of any defects which may exist.

We do think, therefore, that there is any error shown in the ruling of the court upon the instructions to the prejudice of the plaintiff in error upon the point considered.

Instruction No. 9, given by the court, as to the measure of damages, correctly states the rule as applied to the facts of this case.

Nor do we think the court erred in refusing to set aside the verdict as contrary to the evidence. It is true there is no direct evidence that the seed which are the subject of this controversy were not of the crop of 1910. It is difficult to conceive how there could have been direct evidence of that fact upon the part either of the plaintiff or of the defendant. It is plain, however, that the affirmation of the fact that the seed were of the crop of 1910 was made by the plaintiff in error, and it was intended to influence the defendant in error as an affirmation of quality, and was so relied upon. There was no warranty of the germinating properties of the seed sold, but there was evidence that seed of good quality of the crop of 1910 were good, merchantable seed; that it was the well recognized course of business to buy of the crop of 1910 to be seeded in the season of 1911; and that the lapse of a year would not materially affect the quality of the seed. If this be true, then the fact established beyond doubt, that the seed

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had practically no germinating qualities strongly tended to prove that they were not grown in the season of 1910, and tended to prove a breach of the affirmation or warranty that they were seed of that year's growth.

With reference to the correspondence of the bulk with the sample, the sample itself was not produced in evidence before the jury; it was not in the possession of the defendant in error. It was exhibited at the time of the purchase, but was retained by the agent of the seller. But the testimony of expert seedsmen was before the jury that the sample exhibited was by them carefuly examined, not only with the eye but with a magnifying glass, and was found to be fresh looking, bright seed, while the bulk of the seed were darker than the sample.

Upon the whole case, we are of opinion that the judgment of the hustings court should be affirmed.

Affirmed.

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Wytheville

JORDAN AND OTHERS v. WALKER.

June 12, 1913.

1. TRIAL—*Case for Jury.*—An action for deceit is peculiarly one for the consideration of a jury when the conclusions to be drawn from the evidence are not so certain and incontrovertible that fair minded men may not differ with respect thereto.
2. DEMURRER TO EVIDENCE—*Conflicting Evidence—Judgment.*—Upon a demurrer to the evidence, where the evidence is conflicting and is of such character that the jury might have found a verdict for the demurree, it is the duty of the court to enter judgment in his favor.
3. FALSE REPRESENTATIONS—*Reliance Upon—Inquiry.*—One to whom a representation has been made as an inducement to enter into a contract has the right to rely upon it as true *quoad* the maker, and he need make no further inquiry; and if he does so rely upon it, and it turns out to be untrue, the party making the representation is liable for the resulting damages, which may be recovered in an action of deceit.
4. FALSE REPRESENTATIONS—*Reliance Upon—Question for Jury.*—Whether the plaintiff in action of deceit (to recover damages for the false representations of the defendant) relied upon the defendant's representations, or acted in whole or in part on his own knowledge, is a question for the jury.
5. TORTS—*Joint Wrong-Doers—Participation.*—Where one party is a participant in and a beneficiary of the wrong of another, which could not have been made effectual without his co-operation, the two are jointly liable to the party injured.

Error to a judgment of the Circuit Court of Greensville county, in an action of trespass on the case. Judgment for the plaintiff. Defendants assign error.

Affirmed.

The opinion states the case.

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S. V. Southall and *Richard B. Davis & Son,* for the plaintiffs in error.

Buford, Lewis & Peterson and *E. C. Palmer,* for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

The material facts out of which this litigation arises are as follows: The Tillar-Smith Hardware Company, incorporated under the laws of Virginia, was organized on January 1, 1906, with a capital stock of $12,500, divided into shares of $100 each, having its principal office at Emporia, Greensville county, Virginia, of which stock W. T. Tillar held $3,000, J. H. Smith $3,000, Rupert Ivey $500, L. G. Walker $3,000, R. W. Jordan $2,000, and B. D. Tillar $1,000. All of the stockholders at that time resided in the town of Emporia, and at the organization of the company L. G. Walker became one of its directors and its vice-president, but owing to other business engagements he was unable to give his personal attention to the affairs of the company, and soon afterwards removed from Emporia and engaged in business elsewhere, and before the year 1909 he had ceased to be a director or to hold any official connection with said company. W. T. Tillar was president of the company from its organization, and J. H. Smith its business manager, who together with R. W. Jordan and L. G. Walker were its directors, while B. D. Tillar was a clerk in the store kept by the company; both Jordan and B. D. Tillar being connected with the company "the entire time it was running," and both familiar with its affairs and knowing its financial status. The business of the company, it seems, was prosperous during the years of 1906 and 1907, and a dividend of about ten *per cent.* on its stock was declared in January, 1907, and again in January, 1908,

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but, during the year 1908, the company purchased and operated for a while a manufacturing plant which resulted in financial losses, whereby the capital stock of the company was somewhat impaired. Early in 1909 L. G. Walker became dissatisfied with the management of the affairs of the company—first, because J. H. Smith, its manager, had overdrawn his account to the amount of $1,368; and second, because the company had engaged in the manufacturing business, which he regarded as being beyond the scope of the business for which the company had been chartered; and, thereupon, he (Walker), accompanied by his counsel, went to Emporia to inquire into these two matters, and, in ascertaining the status of Smith's account, Walker's counsel had to be assisted by the bookkeeper of the company. This investigation, it appears, resulted in a determination on the part of Walker to institute legal proceedings to require Smith to settle his account, and perhaps to remove him from the position of manager, and to prevent the company from engaging further in the "mill" business, which determination on the part of Walker was communicated to Jordan in an interview about March 18, 1901. On the day following this interview, Jordan wrote to Walker, who was then at Danville, Va., endeavoring to dissuade him from instituting the threatened legal proceedings, and suggesting the plan of buying up enough of the stock of the company to give control of the management of its affairs, and expressing a willingness to sell his stock and to aid in acquiring other shares of the stock. Then followed a lengthy correspondence between these parties, in which it appeared that Jordan and B. D. Tillar were, in fact, endeavoring to effect a sale of their stock, but Walker throughout stated that he did not wish to buy, and that he would only go so far as to unite with Jordan to get new parties interested in the business and to acquire a controlling interest in the stock, so that they might manage the busi-

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ness more satisfactorily; Walker believing then, as he had every reason to believe, from what had passed between him and Jordan, and to continue to believe from their subsequent dealings, that he and Jordan were co-operating in good faith to accomplish the same purpose; and it seems not to have occurred to Walker that such was not the case until after he had become the purchaser of the holdings of Jordan, B. D. Tillar and Rupert Ivey in the company.

As a result of these negotiations, Walker, on July 31, 1909, went to Emporia with the view of interesting a Mr. Harper in the business, and to have him (a capable man) undertake the management of the company's affairs, and there and then Jordan, assisted by B. D. Tillar, went over the books and furnished Walker with a statement showing what the company owed, its assets, etc., by which it was made to appear that the business could pay all of its debts, pay the stockholders what they had put in and still have a surplus left of about $3,000. Harper, however, did not become interested in the business, and later and after further interview with Jordan, Walker, relying upon the truth of the statement as to the condition of the company's affairs made up by Jordan and B. D. Tillar, decided to take over to himself the stock of Jordan, B. D. Tillar and Ivey, and accordingly, on August 3, 1909, he made settlement with these parties for their stock and placed his (Walker's) brother temporarily in charge of the business. Having purchased this stock under the circumstances narrated, Walker left Emporia, and in the course of a few days received from his brother, who had been temporarily put in charge of the business, a letter stating that the affairs of the company were in a desperate condition. He also received a letter from W. T. Tillar of similar import, and acting upon this information he returned to Emporia and sought an interview with Jordan, the result of which was that Jordan did not deny the truth as asserted by Walker,

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but refused to take back his stock, as Walker claimed he had agreed to do, giving as his only reason for refusing to do so that he had hypothecated the note given by Walker in part payment for his (Jordan's) stock to a third party.

This action was brought by Walker on the 3rd day of January, 1910, against R. W. Jordan and B. D. Tillar to recover damages for false representations made by them as to the financial condition of the said company, by means of which representations the plaintiff alleged that he was induced to purchase thirty-five shares of the capital stock of the company for the aggregate sum of $2,650.

There were two trials of the case—the first at the April term of the circuit court, 1910, resulting in a verdict for the plaintiff, which verdict was, on October 3, 1911, set aside by the court and a new trial ordered. On the second trial at the conclusion of the evidence the defendants demurred thereto, in which demurrer the plaintiff joined, and in the conditional verdict rendered by the jury they assessed the plaintiff's damages at the sum of $2,650.00, with interest on $1,150.00, part thereof, from the 4th day of November, 1909, and on $1,500.000, the residue thereof, from the 3rd day of February, 1910, until paid, subject to a credit of $1,500.00 as of the 3rd day of February, 1910, the amount of the note executed by the plaintiff to the defendant, R. W. Jordan, for the stock purchased of him." The court overruled the demurrer and rendered judgment for the plaintiff in accordance with the verdict of the jury, to which judgment the defendant obtained this writ of error.

In addition to the facts already stated, a material fact alleged, and which the evidence tended to prove, was the false representation made by plaintiffs in error, and which operated as a principal inducement to defendant in error to buy the stock in question, that the entire liabilities of the company did not exceed $12,000, when in fact they were

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almost or quite double that amount. Relying, as he alleges, upon the truth of this and the other false representations made by plaintiffs in error, defendant in error purchased of Jordan twenty shares of his stock and five shares owned by Ivey, on which Jordan had procured an option for the purpose of enabling him to make a more advantageous sale of his own stock; and of B. D. Tillar ten shares. He executed to Jordan a note for $1,500 in part payment for his stock, and delivered to him a certified check for $400 for Ivey's stock; and paid Tillar in cash $500 and executed his note for $250, which Tillar discounted at bank and defendant in error paid to the bank at maturity. The aggregate of the prices so paid constitutes the amount of damages awarded by the verdict of the jury and the judgment of the trial court in favor of defendant in error, which verdict and judgment, in effect, and were doubtless so intended, restore the parties to the litigation to the position they would have occupied had not the sale of the stock in question to defendant in error been consummated.

The questions arising upon the issue presented in the record are: (1) Was there a false representation of a material fact made by plaintiffs in error to the defendant in error? (2) Did the plaintiffs in error know that the representation was false, or was it made by them so recklessly as to amount to fraud? (3) Did the representation operate as an inducement to defendant in error to purchase the stock? (4) Was the defendant in error justified under the circumstances in relying upon the representation? (5) Did the defendant in error, notwithstanding the representation, undertake an independent examination of his own to ascertain the liabilities of the company? (6) Did defendant in error suffer damage as a result of the representation?

The case thus presented was pecurliarly one for the de-

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termination of the jury, since the conclusions to be drawn from the evidence were not so certain and incontrovertible that fair-minded men might not have differed with respect thereto.

The plaintiffs in error were clearly shown by the evidence to have been in a position to know the truth or falsity of the representations made by them to defendant in error as an inducement to him to buy their stock, while defendant in error was not. Plaintiff in error, Jordan, was a director continuously from the organization of the company until August 4, 1909, the date of the sale of his stock to defendant in error; he had been elected vice-president in the place of defendant in error, and held that position during the year 1909 until he sold his stock; was an expert bookkeeper and acted for a time as treasurer of the company; knew as early as the summer or fall of 1908 that the company was financially embarrassed and that on April 1, 1909, the bookkeeper for the company resigned her position because her salary of $40 per month could not be paid. His coplaintiff in error, B. D. Tillar, was connected with the company "the entire time it was running," in the capacities of salesman, one of the directors and manager, and in these circumstances the two, pretending their co-operation with the defendant in error to bring about a better condition of the affairs of the company so that its business might be more satisfactorily conducted, made up, on the night of July 31, 1909, a false statement of the liabilities and explaining the apparent solvency of the company, and also falsely declaring that the company had then recently paid off a considerable portion of its indebtedness, which statement was furnished to defendant in error by Jordan and B. D. Tillar, they well knowing that he would act upon it as well as upon other representations made to him as to the condition of the company's business, for the manifest reason that he, (defendant in

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error) had been away from Emporia for a long while, and had every reason to believe that Jordan, at least, was co-operating with him, in good faith, in the efforts to put the company upon a better footing, and that its affairs could be thereafter successfully conducted.

We do not consider it necessary to review the evidence in the case further than has been done, since the testimony of the principal actors in the transaction of which defendant in error complains is conflicting on all essential points, and there is evidence amply sufficient to have justified a verdict by the jury in favor of defendant in error upon every question of fact presented, and it is hardly necessary to cite authority for the proposition that if the jury could have so found this court, upon the demurrer to the evidence, must so find.

The rule is clearly stated in *C. & O. Ry. Co.* v. *Corbin*, 110 Va. 700, 67 S. E. 179, where it is held: "Upon a demurrer to the evidence, where the evidence is such that the jury might have found for the demurree, it is the duty of the court to enter judgment in his favor."

Plaintiffs in error's own evidence does not, by any means, refute the charge that they represented to defendant in error, not only the solvency of the company, but that it had a surplus of $3,000 in excess of its liabilities and capital stock, when in fact it was then hopelessly insolvent, and that in the receivership proceedings which ensued shortly afterwards the assets were found sufficient to pay the creditors only about thirty *per cent.* of their debts, and, therefore, the stock was utterly worthless; but they insist that though this was all true, defendant in error is not entitled to recover in this action as he did, or ought to have investigated for himself to find that the representations that had been made to him as to the financial condition of the company were false.

"Where it is established that there has been any fraudu-

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lent representation by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You, at least, who have stated what is untrue, or have concealed the truth for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty.'" *West End L. Co.* v. *Claiborne,* 97 Va. 734, 34 S. E. 900.

If one represents as true what he knows to be false, in such a way as to induce a reasonable man to believe it, and the representation is meant to be acted on, and he to whom the representation is made, believing it to be true, acts on it and in consequence thereof sustains damage, there is such fraud as will support an action for deceit at law, or a bill for rescission of the transaction in equity. Whether the representation is made innocently or knowingly, if acted on, the effect is the same. In the one case, the fraud is constructive; in the other, it is actual.

"One to whom a representation has been made is entitled to rely upon it *quoad* the maker, and need make no further inquiry." *Cerriglio* v. *Pettit,* 113 Va. 533, 75 S. E. 303. See also *Rafferty* v. *Heath, post* p. 195, 78 S. E. 641; *Straud* v. *Griffith,* 97 Fed. 854, 38 C. C. A. 444; 20 Cyc. pp. 60, 62.

The authorities are uniform in holding that whether a plaintiff in such a case relied upon the defendant's representation, or whether he acted in whole or in part upon his own knowledge, is a question for the jury.

An effort is made by the learned counsel for plaintiffs in error in this case to extricate B. D. Tillar from the legal consequences of their deceit in inducing defendant in error to purchase their stock, but we are wholly unable to appreciate the force of the argument in support of this contention. It may be that plaintiff in error, Jordan, was

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the more experienced and shrewder of the two engaged in the transaction which resulted in procuring the defendant in error as a purchaser of their stock; still they (brothers-in-law) were participants in and the beneficiaries of the wrongs of which the defendant in error complains, which wrongs could not have been made effectual without the co-operation therein of Tillar with Jordan. From their own testimony they represented to the defendant in error the liabilities of the company as being only about half the actual amount, when they knew well at the time of the existence of other indebtedness which they did not mention. It also very clearly appears from the evidence that the statement of the witness, W. T. Tillar, introduced by plaintiffs in error, in his letter of August 7, 1909, to defendant in error, was an accurate statement of the facts: "I feel like you have been misled and misinformed as to the true condition of this business. Some of the parties who sold you their stock offered to sell me recently and evidently were glad to unload their stock on you."

The judgment of the circuit court is right, and is, therefore, affirmed.

Affirmed.

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Wytheville

KINCHELOE AND OTHERS v. GIBSON'S EXECUTRIX.

June 12, 1913.

Absent, Keith, P.

1. TAXATION—*Taxes Accrue February First—Who to Pay.*—Taxes accrue and become personal charges against the owners of real estate as of the first day of February of each year, and where the owner dies subsequent to that date the taxes for that year become a preferred charge against his estate.
2. WILLS—*Benefit to Life Tenants—Remaindermen.*—Where a testator has charged his whole estate with the payment of his debts, and provided for a sale thereof for that purpose, and directed the order in which the property is to be sold, and subject to these provisions has given his property to one set of persons for life and to another in remainder, intending that the life tenants shall have the possession and enjoy any incidental benefits arising from the use of the property until a sale is necessary, the remaindermen cannot complain of such benefits derived by the life tenants, but take their estate *cum onere.*
3. LIFE ESTATES—*Interest on Encumbrances—Who to Pay—General Rule—Exceptions.*—As a general rule, a tenant for life of property subject to incumbrances must keep down the interest accruing on such encumbrances during the continuance of his estate, but the doctrine is qualified where, as in the case in judgment, there is a general charge of all of testator's debts on his real estate, in the event the personal property proves insufficient to pay them. In such case the general doctrine does not apply. Here the life tenant ought not to be disturbed until a change of possession is made necessary in fulfilment of the charge imposed on this property by the will, or until mismanagement thereof or misapplication of its profits, render it improper that he should hold the possession any longer.
4. LIFE ESTATES—*Insurance on Buildings—Case in Judgment.*—Whether a court of equity can, in any case, impose upon a life tenant the burden of insuring buildings on real estate for the benefit of the remaindermen is unnecessary to decide in this case, as the situation of the testator's property in the case at bar does not warrant such a requirment of the life tenant.

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Appeal from a decree of the Circuit Court of Fauquier county. Decree for the complainant. Defendants appeal.

Amended and Affirmed.

The opinion states the case.

Keith & Richards, for the appellants.

Moore, Barbour, Keith & McCandlish and *J. Stuart White,* for the appellees.

CARDWELL, J., delivered the opinion of the court.

The appeal taken in this case is from two decrees of the circuit court of Fauquier county entered in the chancery cause pending in said court under the style of *Gibson's Executrix* v. *Gibson, et als,* the one entered on the 27th day of July, 1909, and the other on the 31st day of January, 1911, which chancery cause involved the construction of the last will and testament of Gilbert B. Gibson, a lawyer, late of Fauquier county, and a settlement of his estate.

The said testator died in the early part of the year 1907, and his will, bearing the date of December 18, 1906, was admitted to probate March 27, 1907, and Nellie R. Gibson, a sister of the testator, qualified as the sole executrix thereof, her sister, the other executrix named, declining to qualify as such. Said testator, at the date of his will and at his death, appeared to own considerable personal estate and several parcels of real estate, but was largely indebted, both primarily and as surety for others.

By his will the testator purposed to bestow his bounty, consisting of the personal and real estate owned by him, upon his collateral kin, but charged both his personal and

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real estate ultimately with the payment of his debts, endeavoring to designate the order in which the same should, if found to be necessary, be subjected to sale for that purpose. The first clause of the will devised a certain portion of testator's farm called Sunnyside, containing 170 acres, more or less, to his brothers, Joseph A. and Douglas Gibson, in trust for the sole and separate use of his sisters, Mary J., Margaret V., Fannie B. and Nellie R. Gibson, during their lives, with power to each to dispose absolutely by deed or will of one-eleventh part of said land, to take effect at the death of the last surviving of the four sisters. The remaining seven-elevenths of this tract of land the testator devised, by the second clause of his will, after the death of his said sisters, in equal shares to his other brothers and sisters named, and their descendants; but it appears in the record, in regard to this particular tract of land, that by deed executed by said testator bearing date December 24, 1883, though only found among the papers of one of the deceased's grantees after his death and after the institution of this suit, the said testator, Gilbert B. Gibson, had conveyed this land (Sunnyside) to John M. Gibson, Joseph A. Gibson and Douglas Gibson, as trustees, for the sole and separate use of the four sisters of the testator named in the first clause of his will, and Louisa Gibson, who died before the testator; and it further appears that throughout his life the testator managed this farm for the benefit of these sisters and accounted to them regularly for the rents, issues and profits thereof, and that there stood on his ledger an account showing a balance due by him at the time of his death to these four sisters of $517.64 arising from his operations of the Sunnyside farm during the year preceding his death, which indebtedness the executrix of his will paid to the sisters out of the assets of the testator's estate.

The third and fourth clauses of the will have no material

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bearing upon the controversy here. By the fifth clause the said four sisters of the testator are devised, during their lives, the residue of Sunnyside farm and the testator's land bought of Lucius, known as the Briar Patch, containing 230 acres, more or less, and "the residue of my personal property;" and further, "if my personal property other than that I have bequeathed specifically be not sufficient to pay my debts, the Lucius tract must be the first land to be sold for that purpose."

The sixth clause of the will provides that upon the death of testator's sisters, Mary J. and Nellie R. Gibson, the specific personal property willed them by the fouth clause, consisting of his household and kitchen furniture as well as testator's residence and adjacent land, should go to his niece, Anna W. Kincheloe, for her life, and upon her death to go to her daughter, Ada Kincheloe, with certain other provisions for the disposition of this property in the event that the said Ada Kincheloe should die without issue.

By the seventh clause of the will it is provided that upon the death of the four said sisters of the testator his seventy-five acre tract of land, being the residue of Sunnyside, *"or any part of same or proceeds thereof if sold,* after the payment of my debts, *that may remain,"* should go to his grand-nephew, J. Gibson Kincheloe, and grand-nieces, Orra Mason Kincheloe and Ada Kincheloe, and any children that might be born to James M. Kincheloe and Anna W. Kincheloe." This residue of Sunnyside, containing about seventy-five acres, together with other real estate of the testator, was at the time of his death subject to a specific lien, evidenced by deed of trust, to secure the payment of the sum of $3,552, spoken of in this record as the Eliza N. Gibson dower fund; and by the same (seventh) clause, the testator provided that upon the death of his said four sisters "I give and devise the Lucius tract, containing 230 acres, more or less, or any part thereof or pro-

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ceeds thereof if sold, that may remain after the payment of my debts" to certain nieces and nephews therein mentioned.

The eighth clause of the will is, "I devise to my grandnephew, J. Gibson Kincheloe, my vacant lot in Upperville, Va., on which the house thereon was burned and my ground rent of nine dollars a year on T. S. Dunbar's lot with wheelwright and blacksmith shop thereon. My personal property bequeathed under the fifth (5) clause of this will, if not exhausted in the payment of my debts, or such as may remain, if any, after the payment of my debts, I give absolutely to my sisters, Mary J., Margaret V., Fannie E. and Nellie R. Gibson;" and the ninth or last clause of the will is, "The personal property in the fifth clause of this will is to be first applied to the payment of my debts, if not sufficient to pay all, then the Lucius land is to be sold for that purpose and if the proceeds of sale are not sufficient, then the seventy-five acres of land or thereabouts referred to in said fifth clause is to be sold for that purpose."

It will thus be seen that the testator's four named sisters were by his will made life tenants practically of his whole real estate; his dwelling in the town of Upperville, with lot attached thereto; 170 acres, a portion of Sunnyside farm; 230 acres, the Lucius tract; seventy-five acres, the residue of Sunnyside; and two lots of twenty-five and five acres; a total of over 500 acres of land; and also testator's personal property, with remainder, after the death of the last surviving of the four sisters, over to certain other persons named, including J. Gibson Kincheloe, Orra Mason Kincheloe and Ada Kincheloe, nephew and nieces of the testator, and any other children that might be born to James M. Kincheloe and Anna W. Kincheloe, who were to take the remainder after the said life estate in the seventy-five acres, residue of the Sunnyside tract; but this, as well as the testator's other real estate and his personal

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property, was charged with the payment of his debts and was to be sold for that purpose, if found necessary, in certain specified order, the said seventy-five acres to be the last sold.

The real estate devised by the will was taken charge of by the devises thereof for life, and after the estate had been managed and administered for practically two years from her qualification, the executrix of the will, in February, 1909, filed the bill in this cause, the object of which was to have the direction of the court in the further administration of the estate and the *ex parte* accounts settled by her as executrix and filed, approved and confirmed by the court in this cause, filing with her bill the last of her said accounts as the basis of this suit.

Upon the cause being matured for hearing, the court referred it to a master commissioner to state and settle the accounts of the executrix, the fourth clause of this decree of reference specifically directing the master to state and settle the accounts of the executrix commencing from the date of her qualification up to and including the second year of her administration which was in effect to require a restatement of the *ex parte* account of the executrix covering that period, settled and returned to court of date February 10, 1909; and in response to said decree of reference Commissioner G. L. Fletcher, on June 5, 1909, filed his report. This report and the accounts returned therewith showed that the testator's estate, after paying the expenses of administration and the current accounts, still had outstanding against it an indebtedness of $15,492.00, and that there was in the hands of the executrix applicable to the payment of said indebtedness only the sum of $6,179.49, thus leaving an indebtedness against the estate of about $9,000 over and above the assets in the hands of the executrix, and under the control of the court in this cause.

To this report the infant defendants, J. Gibson Kinche-

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loe, Orra Mason Kincheloe and Ada Kincheloe, by their guardian *ad litem,* filed certain exceptions, which made the contention that the commissioner in stating the accounts erroneously charged against the estate all of the interest accrued and accruing on all the indebtedness of the estate remaining unpaid, taxes, running expenses, etc., and gave all the income from the estate—rents, issues and profits—to the life tenants; and that the interest on said indebtedness and taxes alone for the years 1907, 1908, and 1909, amounted to $1,811.60.

By its decree of July 27, 1909, the court, in effect, ruled that the method adopted by the commissioner in stating the accounts of the executrix, complained of in said exceptions, was proper, but recommitted the cause to the commissioner for the correction of certain minor errors in the accounts. Later the Lucius tract of land, in which said infant defendants had no interest, was decreed to be sold, was sold. The proceeds of sale, together with other assets of the said testator's estate brought within the control of the court, produced a considerable reduction in the outstanding indebtedness of the estate, but not enough to pay all of its indebtedness, and then followed other decrees in the cause leading up to a report by Commissioner Fletcher, filed on August 15, 1910, showing an unpaid indebtedness of the estate amounting to $9,947.88 and a balance in the hands of the executrix of $3,352.00.

To this report the said infant defendants filed exceptions, the second of which related to an indebtedness reported as an outstanding liability against the estate and known as the "Cover debt," and made the contention that said debt had been paid, which exception the court sustained and thus eliminated the "Cover debt." The other of said exceptions made again the contention that the interest on the testator's indebtedness, taxes, etc., credited to the executrix as against the estate, should have been paid

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by the life tenants of the testator's property who received the income therefrom under the will of the testator, so that the seventy-five acre tract of land, in which said infant defendants have an interest after the death of the life tenants, would be relieved from the payment of any of the unpaid debts of the testator; that if the charges of interest, taxes, etc., placed upon these infant defendants were eliminated as a charge against the testator's estate and charged against the life tenants thereof, the estate would be about relieved of any further indebtedness and it would be unnecessary to sell the said seventy-five acre tract of land; but the court again overruled this contention and by its decree entered January 31, 1911, amended the commissioner's report so as to conform it to the court's ruling with respect to the "Cover debt," and as amended confirmed the report, and directed a sale of the seventy-five acre tract of land for the purpose of paying the remaining outstanding indebtedness against said testator's estate: from which decree and that of the 27th of July, 1909, this appeal is taken by the guardian *ad litem* of said infant defendants.

As stated, the contention of appellants is that according to the true and proper construction of said testator's will, there was placed upon the life tenants, Mary Jane, Nellie R., Margaret V. and Fannie E. Gibson, the burden of paying the taxes, interest on the debts secured on the property occupied by them as life tenants, cost of repairs and running expenses; that the executrix should not have received credit, in her settled accounts, for taxes and interest accrued during the period of 1907, 1908 and 1909 and paid by her to the amount, as alleged, of $1,811.60; and that if these items of interest and taxes had not been allowed the executrix it would have increased by that amount the apparent balance in her hands applicable to the payment of debts, and correspondingly decreased the excess of liabilities over assets, and might have avoided

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the necessity for a sale of the 75 acre tract of land in which the appellants are alone, as remaindermen, interested.

We consider it wholly unnecessary to review at length in this opinion the several accounts of the executrix, Nellie R. Gibson, stated and reported by Commissioner Fletcher and acted on by the circuit court, since it appears that there are further accounts to be taken in the cause in which minor errors, if any, in the former accounts may be corrected.

The decree of January 31, 1911, complained of, does not hold that the executrix was entitled to credit for taxes paid on the property in the possession and control of the life tenants; on the contrary it expressly holds, and in accordance with the settled law in such cases (*Dowing* v. *Strouse,* 101 Va. 226, 43 S. E. 348), "that the life tenants are chargeable with all taxes and necessary repairs to the property remaining in their possession, and are required to keep the buildings on the same insured against fire, the policies to be taken out in the name of the life tenants and remaindermen and in the name of the trustee, where buildings are on property devised to the trustee." The fact is, as shown by the record and practically conceded in the brief of counsel for appellants, that the only taxes paid by the executrix and taken credit for in her executorial accounts were the taxes assessed against the testator's estate for the year in which he died, 1907, amounting to $152.22, which taxes were properly to be paid by the executrix, and the payment thereof was rightly credited to her in her accounts. It also appears that instead of the life tenants getting the income from the real estate for the first year of the testator's death, the estate got it, and it, along with other assets, was applied to the payment of his debts.

The controlling question, therefore, for determination

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on this appeal is, whether or not the circuit court erred in not ruling that the life tenants of the property held and enjoyed by them under the will of the testator, Gilbert B. Gibson, were bound for the payment of all accruing interest on existing incumbrances upon the property created by the testator, and that payments of interest upon such incumbrances made by his executrix were not properly to be allowed her in the settlement of her accounts as executrix?

The gravamen of the complaint made by appellants in their petition for this appeal is, that the circuit court in its rulings has not placed (as it should have done) the burden upon the four sisters of the testator of paying out of their own means the taxes, interest on testator's debts, repairs and running expenses of the property they took as life tenants and held during the years 1907, 1908 and 1909, but instead the executrix was given credit on her settled accounts for taxes, interest accrued and running expenses during that period and paid by her to the amount, as alleged, of $1,811.60. In the brief of counsel for appellants, however, other objections are made to the method adopted in the settlement of the executrix's accounts, and to certain payments allowed to her as credits against the estate, based upon a statement of facts, but we cannot find in the record that these objections were, by exceptions to the commissioner's reports, raised in the lower court or brought to its attention; nor is it pointed out either in the objections made here or in the record when the several items of interest paid by the executrix and credited to her, of which complaint is made, accrued—that is, whether they accrued before or after the death of the testator. The case was heard on the report of the commissioner, and the accounts filed therewith, September 16, 1910, and the exceptions thereto, and no complaint is made of the court's ruling other than that overruling the third of appellant's

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exceptions and confirming the report as to the items referred to in the exception, viz: "all charges of interest on the indebtedness of Gilbert B. Gibson at the time of his death, as set out in the master commissioner's reports of June 5, 1909, October 7, 1909, April 20, 1910, and September 16, 1910" . . .

We have seen that in her settled accounts the executrix has taken no credit for any taxes for years other than the year 1907, and inasmuch as taxes accrue and become personal charges against the owner of real estate as of the first day of February of each year, and as it is to be presumed from the facts appearing in the record that the testator, Gilbert B. Gibson, died subsequent to the first day of February, 1907, the taxes for that year were a personal charge against him and a preferred charge against his executrix, and, therefore, were properly paid by her and she was rightly allowed credit for their payment in her accounts.

The record does not bear out the contention of counsel for appellants, that the life tenants received all of the rents, issues and profits from testator's estate, and have cast the entire burden of accruing interest on the estate and, in effect, on the remaindermen. It is true that the record shows that the executrix took credit in the settlement of her accounts for certain payments of interest in the years of 1907, 1908 and 1909, but when all the facts appearing in the record are looked to there was no other fair and proper way to state the accounts of the executrix for those years than as they were stated and approved by the court. The entire residue of the personal estate remaining after the payment of debts, like the real estate, was bequeathed to the four sisters, who were plainly the principal objects of his bounty, for life, while this remainder in the personal estate after the payments of debts, unlike the remainder in the real estate, was bequeathed to

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these life tenants and not to others. In the first year after the qualification of the executrix it appears that the personal estate converted and applied to the payment of debts against the testator's estate amounted to over $13,000, the greater portion of which was paid out by the executrix at once, and as to the residue she was charged with and accounted for interest thereon. It further appears from the record that instead of the life tenants getting the income from the real estate for the first year following the testator's death, the estate got the benefit of it, as it has been applied to the payment of testator's debts. The commissioner, in reporting the settlement of the *ex parte* account of the executrix for that year, said: "After the death of Gilbert B. Gibson it was considered to the best interest of the estate not to dispose of all the stock on the farm, but to operate the farm in the usual manner and sell the cattle when fattened and credit the estate with the proceeds." Pursuant to the plan referred to by the commissioner, as the account of the executrix for the first year shows, the estate was credited by the proceeds of fifty-three fatted cattle, which netted $3,680.37, the greater portion of which cattle did not go off until December following the death of the testator and no charge was made against the estate for housing, grazing and fattening said cattle. The account also shows that the estate was credited that year (1907) with $53.00 received from grazing other stock, and with the proceeds of corn raised, to the amount of $677.25, making an aggregate of $1,525.00 actually received in the way of income credited to the estate from the farm lands during the year following the testator's death and applied in the reduction of the debts against his estate.

It is only claimed by the learned counsel for appellants that the aggregate of the items of interest and taxes paid during the first three years by the executrix and credited to her in her accounts amounted to $1,811.60, and when

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the taxes for the first year, amounting to $155.22, is deducted therefrom, the amount of interest included in the payments on the debts during the first three years of her administration was but $1,659.38; whereas, as the record clearly shows, the estate has received benefits from the estate devised to the life tenants amounting to several hundred dollars in excess of the aggregate amount credited to her as payments of interest during the same years, leaving wholly out of view how much of the aggregate of the items of interest credited to the executrix, of which complaint is made, accrued in the lifetime of the testator. So that the record, as we view it, does not sustain or justify the complaint that the executrix had been erroneously allowed credit for the payment of taxes and interest in the settlement of her accounts to the injury of the appellants, and for the all-sufficient reason that these payments for which the executrix took credit were payments on the acknowledged debts of the testator and the interest thereon constituted as much an obligation on his estate as the principal of the debts themselves.

The situation in which the testator left his estate was simply this: His personal property, as he recognized to be probable, was not sufficient to pay his debts; certain of his real estate at his death was encumbered either by a trust charged thereon by him in favor of his four sisters or by trust deed creating a specific lien before the making of his will, to secure the payment of a debt, spoken of in the record as the Eliza N. Gibson dower fund, the principal of which debt was to become due and payable at the death of the said Eliza N. Gibson, and the interest thereon to be paid to her annually during her life; specific liens being upon the residue of Sunnyside in which appellants have an interest, as well as upon other real estate of the testator.

The testator, a trained lawyer and a man of affairs, is

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presumed to have known that his estate could not be speedily settled—in fact, it plainly appears from his will that he not only expected but desired that his aged sisters, the first objects of his bounty, should have the possession of his real estate pending the ascertainment of the necessity for a sale thereof for the payment of his debts, and receive any incidental benefits that might arise therefrom. He gave his entire estate, real as well as personal, to one set of beneficiaries for life, with remainder to others in such portions thereof as *"might remain" after sale for the payment of debts,* all charged with the payment of his debts, and he directed not only the *order* in which the several portions of his estate should be subjected, if found necessary, to his debts, but the manner thereof, viz., by sale. Had he intended that the life tenants of his real estate were not to enjoy the benefits thereof pending an adjustment of his affairs and the ascertainment of the extent of his indebtedness, doubtless he would have so provided in his will by giving his executrix adequate powers to effect his intent, such as the power to take charge of and operate or rent the estate, rather than a bare power to sell in a given contingency certain portions of it in a stated order. Instead of conferring upon his executrix such power, the testator's will clearly and expressly provided that the only way in which his real estate should be subjected to his debts should be *by sale,* expressly directing also the order in which each parcel should be sold. Any advantage resulting to the life takers is merely incidental to the terms in which the testator chose to dispose of his bounty, "the ultimate expression of his wishes," and the remaindermen as well as others took *"cum onere"* and subject to the incidents resulting from carrying into effect that "ultimate expression" of the testator's wishes "which stands as an all sufficient reason for his act and cannot be challenged" by anyone claiming thereunder. *Frazier* v. *Littleton,* 100 Va. 9, 40 S. E. 108.

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The general proposition of law, that a tenant for life of property subjected to encumbrances must keep down the interest accruing on such encumbrances during the continuance of his estate, is well established, and is not here controverted, but the doctrine has to be qualified where, as in this case, there is a general charge of all of testator's debts on his real estate, in the event that the personal estate proved insufficient to pay them. In such a case the general doctrine does not apply. *Poindexter* v. *Green,* 6 Leigh (33 Va.) 504, which is in many respects like the case at bar; 18 Cyc. 307 and authorities cited; *Trent* v. *Trent,* Gilmer (21 Va.) 174, 9 Am. Dec. 594, where the opinion by Roane, J., says: "The right of possession thus doubly guaranteed to the present appellants (life tenants) ought not to be disturbed, until a change of possession should be made necessary in fulfilment of the charge imposed on this property by the will; or until mismanagement thereof, or misapplication of its profits, should render it improper that the appellees should hold the possession any longer. In either of these events, however, the case ought to be previously made out to justify the interposition of the court." See also *Hobson* v. *Yancey,* 2 Gratt. (43 Va.) 75; *Frazier* v. *Littleton, supra; French* v. *Vandenburg,* 105 Va. 16, 52 S. E. 695, 3 L. R. A. (N. S.) 898, 115 Am. St. Rep. 838, 8 Ann. Cas. 5901, where the principle is recognized.

If the testator in this case desired, as his will plainly indicates, the life tenants to take all of his real estate and have the use of it until it became apparent that some of it had to be sold for the payment of his debts, those who take under his will, whether as life tenants or remaindermen, are but partakers of his bounty, and take it *cum onere* and subject to the liability that when it becomes apparent that the personal estate will not be sufficient to pay his indebtedness, that (in the language of

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the will) *"then"* the real estate devised to them in remainder, both life estate and remainder, must be sold. Nowhere in the will is there a suggestion of a purpose on the part of the testator that his estate was to be subjected to the payment of his debts by renting the same, the only provision made to that end being for a sale of certain of his real estate in a given event.

The devise to appellants in remainder is not the "residue of the Sunnyside tract," but the same "or any part of same or proceeds thereof, if sold for the payment of my debts, that may remain." As we view the record it cannot be questioned that the necessity for the sale of this parcel of the testator's real estate for the payment of his remaining outstanding indebtedness had arisen when the decree directing its sale, of which complaint is made, was entered; and we have been unable to find in the settled accounts of the executrix that any injustice has been done appellants. The accounts appear to have been stated upon correct principles of law, and the exceptions taken to the account dealt with in the decree of July 27, 1909, as said by the learned judge of the circuit court in his opinion made a part of the record, "but merely go to the methods of stating the accounts by the commissioner and calling attention to apparent errors and are largely argumentative of the main question submitted."

Appellees assign as cross-error so much of the decree of January 31, 1911, appealed from, as holds that it is the duty of the life tenants to take out insurance, either for the benefit of themselves or for the remaindermen, on the buildings on the real estate devised either to them directly or to trustees. Whether such a burden could, in any case, be imposed by a court of equity upon a life tenant for the benefit and protection of the remaindermen, we need not express any opinion here, but are of opinion that the situation of the testator's property, as appears

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from the record in this case, did not warrant the requirement of the life tenants thereof in the decree of January 31, 1911, with respect to insurance of buildings thereon, and the decree will be amended by striking out of it that requirement; and as so amended it, as well as the decree of July 27, 1909, will be affirmed.

Amended and Affirmed.

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Wytheville

LAMBERT v. BARRETT.

June 12, 1913.

Absent, Keith, P.

1. STATUTES—*Repeals by Implication.*—The repeal of a statute by implication is not favored by the courts. The presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, the two statutes must be irreconcilable. If, by a fair and reasonable construction, they can be reconciled, both must stand.
2. MUNICIPAL CORPORATIONS—*Councilmen of Cities—State Officers.*—While many, perhaps the great body, of the powers and duties of city councils relate exclusively to the local affairs of their respective cities and to matters in which the city alone is interested, they exercise powers and perform duties in which the public at large, the State, is interested directly. They are for many purposes State agencies or instrumentalities, operating to some extent through the medium of city charters in the preservation of public peace and good government.
3. MUNICIPAL CORPORATIONS—*Member of City Council—Vacancy—Code, Section 1015-e—Repeal—Act, February 17, 1906.*—A member of a city council is not a municipal officer within the meaning of the act of February 17, 1906, providing, amongst other things, how vacancies in such offices shall be filled, and hence said act does not repeal section 1015-e of the Code declaring how vacancies in the council shall be filled.
4. STATUTES—*Construction—Statutes in Pari Materia.*—Where there is more than one statute bearing on the same subject, all the statutes in *pari materia* must be considered and harmonized if that can be done by any fair and reasonable construction.

Error to a judgment of the Corporation Court of the city of Alexandria in a proceeding by *quo warranto*. Judgment for the petitioner. Defendant assigns error.

Reversed.

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The opinion states the case.

J. K. M. Norton, for the plaintiff in error.

C. E. Nicol, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is a *quo warranto* proceeding, in which it was determined that the defendant in error, Robert S. Barrett, and not the plaintiff in error, Urban S. Lambert, was entitled to the office of member of the common council from the first ward of the city of Alexandria, made vacant by the death of Hubert Snowden, who was elected a member of the common council at the regular election held on the second Tuesday in June, 1910.

On the 23rd day of April, 1912, the common council, acting under section 1015-e of the Code of 1904, elected Mr. Lambert to fill the unexpired term of Mr. Snowden. At the general election in June following Mr. Barrett was elected by the qualified voters of the city to fill the vacancy caused by the death of Mr. Snowden, in accordance with an act of Assembly approved February 17, 1906. Acts of Assembly 1906, pp. 17-18.

The contention of the defendant in error is, and the trial court so held, that section 1015-e of the Code was repealed by the act of February 17, 1906, and that the vacancy was to be filled in the manner prescribed by the latter statute.

By section 1015-e of the Code it is provided, that "when any vacancy shall occur in the council of a city having one branch, or in either branch of the council of any city having two branches, by death, resignation, removal from the ward, failure to qualify, or from any other cause, the council, or the branch, as the case may be, in which

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such vacancy occurs, shall elect a qualified person to supply the vacancy for the unexpired term."

The act of February 17, 1906, is as follows:

"An act to authorize the several cities and towns of this Commonwealth to appoint officers and employees in addition to those expressly authorized in their respective charters and provide for the filling of vacancies in all municipal offices for the unexpired term.

"1. Be it enacted by the General Assembly of Virginia, that the council of every city or town of this Commonwealth having in their several charters the power to appoint certain municipal officers shall, in addition to such power, have power to appoint such other officers and employees as the council may deem proper, or any committee of such council, or any municipal board, or the mayor of the city or town, or any head of a department of such city or town government, may also appoint such officers and employees as the council may determine, the duties and compensation of which officers and employees shall be fixed by the council of the city or town, except so far as the council may authorize such duties to be fixed by such committee or other appointing power, and may require of any of the officers and employees so appointed bonds, with securities in proper penalties, payable to the city or town in its corporate name, with condition for the faithful performance of said duties. All officers so appointed may be removed from office at their pleasure by joint resolution of the two branches, and where the appointment is by a committee or board, by a vote of such committee or board, or where such appointment is by the mayor or head of a department, such removal may be by order of the mayor or head of department. In case of vacancies occurring in any municipal position so authorized to be filled, a qualified person may be appointed to fill such position for the unexpired term by the proper

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appointing power; and in case of vacancy in any municipal office which is elective by the people, if there be no general election during the unexpired term at which such vacancy can be legally filled, the city or town council may elect a qualified person to fill such vacancy until a qualified person can be elected by the people and shall have qualified for the next succeeding term, or when such general election does occur during the unexpired term at which such vacancy can be filled, such city or town council shall elect a qualified person to fill such vacancy until a qualified person is elected to fill such vacancy at such general election and shall have qualified."

The act of February 17, 1906, does not expressly repeal section 1015-e of the Code. Does it do so by implication?

It is well settled that the repeal of a statute by implication is not favored by the courts. The presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, the two statutes must be irreconcilable. If by a fair and reasonable construction they can be reconciled, both must stand. *Fulkerson* v. *Bristol,* 95 Va. 1, 5, 27 S. E. 815, and authorities cited.

If members of the city council of Alexandria are municipal officers within the meaning of the act of February 17, 1906, there can be no question that the provisions of that act and the provisions of section 1015-e of the Code are in irreconcilable conflict, and that section of the Code must be regarded as repealed by the act of February 17, 1906. The question, therefore, to be determined is, whether they are municipal officers within the meaning of the last named statute.

It is not easy, as was said in *Burch* v. *Hardwick,* 30 Gratt. (71 Va.) 24, 33-4, 32 Am. Rep. 640, to define them (city officers or municipal officers) in all cases; but there are many such provided in the charters of many of the

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cities of the State. Among these are, perhaps, city engineers and surevyors, officers having superintendence and control of streets, parks, water works, gas works, hospitals, sewers, cemeteries, city inspectors, and no doubt many others well known in large cities. Their duties and functions relate exclusively to the local affairs of the city, and the city alone is interested in their conduct and administration. On the other hand, there are many officers, such as city judge, sergeant, clerk, Commonwealth's attorney, treasurer, sheriff, high constable, and the like, some of whom are recognized by the Constitution, while others are not. All these are generally mentioned as city officers, and they are even so designated in the Constitution, but they are not removable by the mayor. The reason is, that while they are elected or appointed for the city, and while their jurisdiction is confined to the local limits, their duties and functions, in a measure, concern the State. They are State agencies or instrumentalities, operating to some extent through the medium of city charters in the preservation of the public peace and good government. However elected or appointed, however paid, they are as much State officers as constables, justices of the peace and Commonwealth's attorneys, whose jurisdiction is confined to particular counties. See also *Mitchell* v. *Witt, Judge,* 98 Va. 457, 36 S. E. 528; *Smith* v. *Bryan, Mayor,* 100 Va. 199, 40 S. E. 652; 1 Dillon Mun. Corp. (5th ed.), sec. 97; 1 McQuillan Mun. Corp., sec. 178.

Tested by the rule laid down in the case of *Burch* v. *Hardwicke, supra,* it cannot be said that the duties and functions of a city council relate exclusively to the local affairs of the city. While many, perhaps the great body, of the powers and duties of a city council relate exclusively to the local affairs of the city and to matters in which the city alone is interested, they exercise powers and perform duties in which the public at large, or the

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State, is interested directly. Under the provisions of section 1038 of the Code, city councils have the power to lay off. control and keep in order streets, which become State highways and belong to the public, or the State. *White Oak Coal Co.* v. *Manchester,* 109 Va. 749, 64 S. E. 944, 132 Am. St. Rep. 943. Their jurisdiction for certain purposes extends beyond the corporate limits. In criminal cases it extends one mile beyond the corporate limits. They have the right to erect water works outside of the city limits, and in order to protect the water from pollution and the works from injury their jurisdiction extends five miles beyond the works; and for the purpose of carrying into effect these and other powers they can enact ordinances, and prescribe fines and other punishments for their violation. While these powers and others do not relate exclusively to the local affairs of the cities, they are in a certain sense municipal officers (*Mitchell* v. *Witt, Judge, supra*), and if there were no other legislation on the subject the broad language of the act of February 17, 1906, might be sufficient to include them. But as there is other legislation on the subject, all the statutes *in pari materia* must be considered and harmonized if it can be done by any fair and reasonable construction. *Mitchell* v. *Witt, Judge, supra; Fulkerson* v. *Bristol, supra.*

If members of a city council be held to be municipal officers, within the meaning of the act of February 17, 1906, that act would be in irreconcilable conflict not only with section 1015-e of the Code, but also with that portion of section 1015-a of the Code which provides, "that all elections to fill vacancies in any (city) council shall be for the unexpired term." If they are municipal officers, then under section 1033 of the Code, the mayor would have the power to suspend and remove members of the city council; for that section provides that the mayor shall see that the various city officers and members of the police and

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fire departments, whether elected or appointed, faithfully perform their duties, and gives him the power to suspend such officers and to remove them for misconduct in office or neglect of duty.

Section 1015-e provides that vacancies in either branch of the council shall be filled by the branch in which the vacancy exists, but if that section has been repealed by the act of February 17, 1906, a vacancy in either branch would have to be filled by the joint action of both branches of the council; for it is clear, we think, that every vacancy which the last named act authorizes the city council to fill, must be filled by the joint action of both branches of the council where it consists of two branches.

If the members of a city council be municipal officers within the meaning of the act of February 17, 1906, then it seems to us clear that the mayor is also a municipal officer within its meaning. If this be so, then it would bring that act in irreconcilable conflict with section 1033 of the Code. That section provides that upon the death, resignation or removal of the mayor, his place shall be filled and his duties discharged by the president of the board of aldermen, or the president of the council, according as the city council has or has not two branches, until another mayor is elected and qualified. That section further provides that within ten days after such death, resignation or removal of the mayor, the corporation or hustings court shall order a special election to be held within thirty days after the order is entered to fill such vacancy, provided the unexpired term remaining after such election is as much as one year; while the act of February 17, 1906, provides that in case of a vacancy in any municipal office which is elective by the people, if there be no general election during the unexpired term at which such vacancy can be legally filled, the city council may elect a qualified person to fill such vacancy until a qualified

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person can be elected by the people, and shall have qualified for the next succeeding term, or when such vacancy can be filled such city council shall elect a qualified person to fill such vacancy until a qualified person is elected to fill such vacancy at such general election and shall have qualified.

If the members of a city council are held not to be municipal officers within the meaning of the act of February 17, 1906, as we think they may be, that act does not repeal section 1015-e of the Code and the other statutes referred to. By such a construction the apparently conflicting laws can be harmonized and all stand.

We are of opinion, therefore, that the trial court erred in not so holding, and in declaring that the plaintiff in error, Lambert, was not entitled to fill the vacancy made vacant by the death of Hubert Snowden until the end of the term for which the latter was elected. Its judgment must, therefore, be reversed, and this court will enter such judgment as it ought to have entered.

Reversed.

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Wytheville

MATHEWS V. HICKMAN.

June 12, 1913.

1. HIGHWAYS—*Roads—Location—Case at Bar.*—The evidence in the case at bar satisfactorily establishes that the true location of the road in controversy is that claimed by the plaintiff in his bill. The road conforms to the description given in the deed under which the plaintiff claims, is upon the location understood between the plaintiff and his grantors, and this construction of the rights of the parties has been continuously acted upon by the parties, without objection, from the time the plaintiff obtained his deed in 1887 until the defendant undertook to obstruct the plaintiff in his use of the road.

Appeal from a decree of the Circuit Court of Accomac county. Decree for the defendant. Complainant appeals.

Reversed.

The opinion states the case.

Stewart K. Powell, for the appellant.

L. Floyd Nock and *Benj. T. Gunter,* for the appellee.

HARRISON, J., delivered the opinion of the court.

In response to the prayer of the bill in this case the circuit court granted an injunction restraining and prohibiting the defendant, Samuel E. Hickman, his agents and all others from obstructing the road mentioned in the bill, or from in any manner interfering with the complainant, Tulley J. Mathews, his agents or tenants, in the

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use and enjoyment of such road. Subsequently on the 6th day of April, 1912, upon final hearing, the court entered a decree dissolving the injunction theretofore granted, holding that the plaintiff was not entitled to the road claimed in his bill. From that decree this appeal was taken.

The record shows that by deed dated October 4, 1887, Ephraim Wessells (of D) conveyed to George T. Ewell and the complainant a tract of land containing forty acres, more or less, it being part of a larger tract owned by the grantor, and that afterwards, by deed dated January 25, 1890, George T. Ewell conveyed his interest in the land to his co-purchaser, the plaintiff. The deed of October, 1887, from Ephraim Wessells (of D), conveying this forty acres of land to the plaintiff and his co-purchaser, contains the following provision: "The said Ephraim Wessells (of D) is to give to the said George T. Ewell and Tulley J. Mathews a road fifteen feet wide running to the Cornelius Hickman road, and then to the land of Gillett Mason." It is clear from the evidence that the "Cornelius Hickman road," referred to in this deed, is no other than that portion of the "Bloxom road" which runs in front of the Cornelius Hickman premises. It appears that the forty acres had no outlet and that the foregoing provision in the deed was intended to secure to the grantees a convenient outlet for their land to the Bloxom road. It is shown that at the time this deed to the forty acres of land was made by Ephraim Wessells the road now contended for by the plaintiff was in existence and extended across the northeast side of the land retained by Wessells, out to the Bloxom road in front of Cornelius Hickman, and had been for many years prior thereto recognized as an open road. This road conforms to the description of the road mentioned in the deed. It runs to the Bloxom road in front of Cornelius Hickman, and thence to the land of Gillett Mason.

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It appears that at the time of the conveyance of the forty acres, it was understood between Ephraim Wessells and his grantees that the then existing road over the northeast side of the land retained by him was the road intended by the terms of the deed, and this construction of their rights has been continuously acted upon by the parties, without objection, until the defendant undertook to obstruct the plaintiff in his use of the road. Some time after the deed to the forty acres was made and recorded, Ephraim Wessells sold to John E. Hickman, the father of the defendant, under whom the latter claims, that portion of the land reserved by him over which the road claimed by the plaintiff runs. The defendant does not deny that the plaintiff is entitled, under his deed, to a road fifteen feet wide, as an outlet from his forty acres, but insists that the road intended by such deed is not located upon the land owned by him, but that its true location is about 676 yards west of that claimed by the plaintiff and upon the remaining land of Wessells after his sale to the defendant.

The evidence wholly fails to sustain this contention. The road as located by the defendant would not conform to the description of the road mentioned in the plaintiff's deed. Instead of having its exit on the "Bloxom road" at the point named in the deed, it would come out into that road at a point 625 yards west thereof, where Cornelius Hickman, at the time, owned no land. There is nothing in the description of the road in controversy, as set forth in the deed, that could lead to the conclusion that it ran as the defendant contends, and, without prolonging this opinion with further details, it is enough to say that the evidence satisfactorily establishes that the true location of the road in controversy is that claimed by the plaintiff in his bill.

The decree complained of must, therefore, be reversed,

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and this court will enter such decree as the circuit court ought to have entered, perpetuating the injunction restraining and prohibiting the defendant, Samuel E. Hickman, his agents and all others, from obstructing the road claimed by the plaintiff in his bill, or from in any manner interfering with the complainant, his agents or tenants in the use and enjoyment of such road.

Reversed.

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Syllabus.

Wytheville

MIDDLE ATLANTIC IMMIGRATION COMPANY v. ARDAN.

June 12, 1913.

1. BROKERS—*Real Estate Agents—Commissions—Completed Sale—Release by Vendor.*—If a real estate agent or broker, in pursuance of his contract with a land owner, has found a purchaser ready and willing to comply with the vendor's terms, and has brought the parties together, and they have entered into a valid contract of sale which the vendor can enforce and the sale has been completed so far as the agent is concerned, he cannot be deprived of his compensation by the voluntary release of the vendee and refusal of the vendor to consummate the sale, without the assent of the agent. So likewise, the vendor is liable to the agent for his compensation if, without the latter's consent, he release the vendee rather than incur the expense or annoyance or delay of litigation.
2. INSTRUCTIONS—*Sufficiently Instructed.*—It is not reversible error to refuse a correct instruction where the principle announced in it is sufficiently stated in another instruction given.
3. BROKERS—*Real Estate Agents—Commissions—Vendor Without Fault.*—A real estate agent or broker is not entitled to recover his commission for the sale of land where the whole fault of the miscarrriage of the contract of sale was on the part of the purchaser, and the vendor was without fault in the premises.
4. BROKERS—*Real Estate Agents—Commissions—Representation of Solvency by Broker.*—Where a vendor of land is not influenced by the misrepresentations of his broker as to the financial condition of his vendee, such misrepresentations do not constitute a ground for refusing to pay the broker's commission, but the rule is otherwise where the vendor has no knowledge of the financial condition of the vendee and relies upon the representation of the broker that the vendee is ready, able and willing to buy, and is financially responsible for his contracts, which representation is untrue.
5. BROKERS—*Real Estate Agents—Commissions—Failure to Sue Vendee—Advice of Counsel.*—In order to excuse a vendor from bringing suit against his vendee to enforce a contract for the sale of real estate and relieve himself from his obligation to pay his broker's

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commission, it is not sufficient for him, when sued for the commission, to prove that he was advised by his counsel that such a suit would be expensive and useless, but all the facts obtainable upon that question should be laid before the jury, and if as a result it should be made to appear that a suit would have been unavailing, the vendor will be excused for declining to institute it, as the law does not compel a man to do a vain and useless thing.

Error to a judgment of the Circuit Court of Cumberland county in an action of assumpsit. Judgment for the defendant. Plaintiff assigns error.

Reversed.

The following instructions were offered by the plaintiff and rejected:

1. The court instructs the jury that if they believe from the evidence in this case that the defendant authorized the plaintiff to sell the tract of land mentioned in the declaration at ten thousand dollars and if so sold by plaintiff to pay plaintiff a commission of $400.00 and the plaintiff sold said property to M. F. Casto, of Deerhead, Kansas, and said Casto was ready, able and willing to complete said purchase, then they must find for the plaintiff.

2. The court instructs the jury that if they believe from the evidence in this case that the defendant, personally entered into a valid, binding and enforceable written contract with M. F. Casto for the sale to said Casto of the defendant's property at the price of ten thousand dollars, and that at the time of entering into such contract said Casto was able to comply with the terms of same; and that the failure to carry out said contract was due either to the fault of the defendant or of said Casto, but was in no wise due to any fault of plaintiff, and said failure was without the consent of and contrary to the wishes of said plaintiff, then they must find for the plaintiff to the extent of his commissions.

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3. The court instructs the jury that if they believe from the evidence that a valid, binding and enforceable contract was made between said Casto and the defendant through the plaintiff as his agent, and that said Casto was financially able to carry out his part of said contract, the plaintiff fully performed its duty towards the defendant, and having fully performed its duty it is entitled to its commissions, provided the failure to carry out said contract was due to no fault on the plaintiff.

4. The court instructs the jury that if Casto was financially able to perform his said contract and refused to do so, and the defendant's title to the property was good, then the defendant could have brought suit against him and have recovered the amount that Casto agreed to pay for said property under his contract with the defendant; that the plaintiff in this case could not have instituted said suit nor have done anything further to enforce the completing of said sale; and that it was the duty of the defendant to force said Casto to comply with said contract; and unless they shall believe from the evidence that the plaintiff consented to the defendant's abandoning said contract, they must find for the plaintiff.

The following instructions were given by the court:

1. If the jury believe from the evidence in this case that the defendant, after the investigation as to whether a suit against Casto would be available to compel him to comply with his contract and was advised by his counsel that a suit would be expensive and useless and would avail him nothing, then he was not bound to bring a suit against Casto, as the law does not compel a man to do a vain and useless thing.

2. The court instructs the jury that before they can find for the plaintiff they must believe that Casto was ready, willing and able in good faith to comply with his contract, and that in determining his willingness, readiness and

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ability to do so, they may consider all the facts proven in this case.

3. The court instructs the jury that before they can find for the plaintiff they must believe from the evidence that the failure of Casto to complete his purchase was due either to a defect in the title or some *default* on the part of the defendant.

4. The court instructs the jury that if they believe from the evidence in this case that the defendant was ready, willing and able to comply with the contract on his part and did all that was necessary to do this, but that Casto arbitrarily and without good cause refused to accept the deed tendered him by the defendant, they must find for the defendant.

5. The jury are to determine from all the evidence in this case whether or not the plaintiffs have made a sale of the defendant's farm as under their contract they were bound to do, and the jury are the judges of the weight of the evidence and the credibility of the witnesses.

Gregory & Boulware and *Meredith & Cocke,* for the plaintiff in error.

A. B. Percy and *Wm. M. Justis, Jr.,* for the defendant in error.

KEITH, P., delivered the opinion of the court.

The Middle Atlantic Immigration Company brought its action in assumpsit against Ardan to recover the sum of $400 alleged to be due it as commissions for negotiating a sale of certain real estate owned by the defendant. The defendant pleaded non-assumpsit, and a jury was impaneled which found for the defendant, and from the judgment rendered by the court upon that verdict the Middle Atlantic Immigration Company obtained a writ of error.

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On the part of the plaintiff there was evidence which proved or tended to prove that Ardan had listed with the Immigration Company a certain parcel of land owned by him in the county of Cumberland, and was to pay the plaintiff in error the sum of $500 upon the agreed price, if a purchaser was found by it. Subsequently the contract was so changed by agreement between the parties that the purchase price of the land was to be $10,000, and the plaintiff in error, if it negotiated a sale, was to receive $400 in commissions. The plaintiff in error produced a man from Kansas, named Casto, who professed himself as ready, able and willing to purchase the property in question, and was accepted as a purchaser by Ardan at the agreed price, and a written contract was signed by both Ardan and Casto, which states that in consideration of $10,000, $5,000 of which had been paid by check, Ardan agreed to sell to M. F. Casto 470 acres of land, known as "Melrose," lying in Cumberland county, together with all live stock, implements and household goods. The balance of the purchase money was to be paid by the assumption on the part of Casto of a deed of trust then upon the land for $3,500, and the residue of $1,500 was to be paid one year from date, with six *per cent.* annual interest, and to be secured by deed of trust on the property. Ardan agreed to give Casto a good and sufficient warranty deed, together with abstract of title and plat of the property, and to give possession of the farm and personal property immediately on acceptance of the deed.

It further appears that the check for the cash payment was placed by Ardan in a local bank, by which it was prematurely forwarded to a Kansas bank for collection without having a deed and abstract of title attached thereto, as had been agreed upon. When the check was presented it was protested for non-payment and returned,

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and thereupon an abstract of title and deed were prepared and attached to a draft, which, when presented, Casto refused to pay and alleged certain objections to the title. There is evidence which tends to prove that when the contract was entered into Casto was ready, able and willing to buy and pay for the land.

On behalf of the defendant in error, Ardan, the testimony proves, or tends to prove, that he was wholly unacquainted with Casto; that he accepted Casto as a purchaser upon the faith of representations made by the agent of the Immigration Company as to Casto's financial responsibility, and that he signed the contract only upon the assurance of the company that Casto was anxious to buy and would pay the check for the cash payment as soon as Judge Smith, of Cumberland county, had approved the deed and abstract of title; that fearing the check might be lost or destroyed, he deposited it in the Bank of Cartersville, to be kept there until the papers could be prepared and attached to it, but by mistake the cashier sent it on before this was done, so that the check reached the bank in Kansas in advance of the other papers which should have accompanied it, and the check was protested for non-payment; that in the meantime Mr. Percy, a Virginia attorney, had prepared a deed and abstract of title and sent them to Judge Smith for verification, and Judge Smith sent them to the Immigration Company with the statement that they were all right; and that these were attached to a sight draft and sent to Casto's bank, but he declined to accept upon the ground that the abstract of title was not satisfactory to his lawyers in Kansas, because the first abstract was not signed by anyone, although it was accompanied by Judge Smith's O. K. To cure this objection Ardan had another abstract made out by Mr. Percy, and caused him also to cure certain defects alleged by the lawyers in Kansas to exist in the title, and these papers

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were again sent to Mr. Casto's bank, and were again returned without payment; that a third abstract was made by Mr. Percy, which was equally unavailing; that Ardan was always anxious to complete the purchase.

The evidence further tends to prove that when it was found that Casto would not take the property, Ardan set on foot inquiries through his counsel, Mr. Percy, as to the advisability of bringing suit against Casto; that Percy reported that from such information as he could obtain, he thought a suit against Casto would be useless. Mr. Percy in his testimony, after stating in detail what had been done with reference to the abstract of title, the preparation of the deed and the removal of the objections to the title, was interrupted by counsel for the plaintiff, who admitted that the objections referred to in a memorandum prepared and sent to Ardan by Casto's counsel were not worthy of consideration and did not affect the validity of the title. Mr. Percy then goes on to say, that after he found that Casto would not take the property in accordance with the terms of the contract, he investigated Mr. Casto's condition with a view of bringing suit, and after a most exhaustive investigation advised Ardan that a suit against Casto would not result in securing the specific enforcement of the contract, or damages for its breach, as his financial condition was not of such a character as would warrant the bringing of a suit, or enable Ardan to collect the judgment if he obtained one, should Casto desire to evade the enforcement; that he gave this advice reluctantly, because he knew it was important to Ardan to have the contract enforced if it could be; and that it was upon the advice of Mr. Percy that he desisted from bringing action.

When the evidence was before the jury, the plaintiff asked for certain instructions, which were rejected.

In *Bankers Loan, &c. Co.* v. *Spindle,* 108 Va. 426, 62 S. E. 266, it is said: "If a real estate agent or broker, in

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pursuance of his contract with a land owner, has found a purchaser ready and willing to comply with the vendor's terms, and has brought the parties together, and they have entered into a valid contract of sale which the vendor can enforce, and the sale has been completed so far as the agent is concerned, he cannot be deprived of his compensation by the voluntary release of the vendee and refusal of the vendor to consummate the sale, without the assent of the agent." And the same doctrine is maintained in *Crockett* v. *Grayson,* 98 Va. 354, 36 S. E. 477, and in *Paschall & Gresham* v. *Gilliss,* 113 Va. 643, 75 S. E. 220.

In *Coleman* v. *Meade,* 13 Bush. (Ky.) 358, it is said: "The true doctrine we take to be this: The broker undertakes to furnish a purchaser, and is bound to act in good faith in representing a person as such, and, when one is presented, the employer is not bound to accept him or to pay the commission, unless he is ready and able to perform the contract on his part according to the terms proposed; but if the principal accepts him, either upon the terms previously proposed, or upon modified terms then agreed upon, and a valid contract is entered into between the principal and the person presented by the broker, the commission is earned." See also *Arents* v. *Casselman,* 110 Va. 509, 66 S. E. 820.

In *Parker* v. *Walker,* 86 Tenn. 566, 8 S. W. 391, it was held, that "A broker who agrees for compensation to procure a purchaser for lands, has earned his commissions when he affects a valid written contract for the sale of lands upon terms and with a purchaser acceptable to the owner. Neither the purchaser's refusal to perform his contract upon grounds not imputable to the broker's fault, nor the voluntary failure of the vendor to compel him to do so, will defeat the broker's claim for commissions." In the course of the opinion Mr. Justice Burton said: "The broker in such case has done all he can do, and all he

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undertook to do. He has produced a purchaser able to comply, or one satisfactory to the seller, for he has accepted him as a purchaser and willing to purchase; for he has freely bound himself by a valid agreement to buy the property. The subsequent unwillingness to carry out his purchase cannot affect the validity of the agreement by which he has bound himself to take the property. This assent of the contracting parties, and this valid agreement, having been brought about through the intervention of the agent, completes his obligation, and is all he undertook to do, and just what his principal employed him to do. If such a purchaser, being thus bound, undertakes to avoid his agreement upon insufficient legal grounds, the vendor may, if he choose, compel a specific performance; but if he elect to release him rather than to incur the expense, or annoyance, or delay of a litigation, he ought not, in equity and justice, make such election at the expense of his broker."

While the authorities we have cited to show that the first instruction correctly states the law as established in this Commonwealth, we are of opinion that instruction No. 2, given to the jury by the court, sufficiently states the principle which it announced, and, therefore, that the refusal to give instruction No. 1 asked for by the plaintiff in error was not prejudicial, and this assignment of error is, therefore, overruled.

We think the second instruction was properly refused, for it renders the seller liable for commissions whether "the failure to carry out the contract was due to the fault of the defendant or of Casto," provided there was no fault upon the part of the plaintiff. In a case where there is no fault upon the part of the agent nor upon the part of the seller, but the whole fault of the miscarriage lay with the purchaser, we cannot agree that the plaintiff is entitled to his commissions. His claim rests upon his having pre-

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sented a purchaser ready, willing and able to complete the purchase. It is true that in this case a purchaser was found who professed himself ready, able and willing to complete the purchase. As to the truth of these representations the evidence tends to prove that Ardan relied solely upon the statements of the agents of plaintiff in error, he himself having no acquaintance with or knowledge of Casto, except what he derived from them.

If the plaintiff is entitled to recover, it must be for a breach of contract upon the part of the defendant by reason of his having omitted to do that which by his contract he ought to have done, or having done that which by the terms of his contract he should have refrained from doing. The recovery must be based upon some default or misconduct on the part of the defendant.

In *Parker* v. *Walker, supra,* after stating that the broker is entitled to his compensation if he has produced a purchaser able to comply, the opinion proceeds as follows: "If such a purchaser, being thus bound, undertakes to avoid his agreement upon insufficient legal grounds, the vendor may, if he choose, compel a specific performance; but if he elect to release him rather than to incur the expense, or annoyance, or delay of a litigation, he ought not, in equity and justice, to make such election at the expense of his broker." To all of which we give our unqualified assent.

As is said in Walker on the Law of Real Estate Agency, section 464, "Where a broker, under a general contract of employment to sell real estate, obtained a purchaser satisfactory to his principal, who made an enforceable contract of sale, without being induced to do so by any representation of the broker as to the purchaser's responsibility, and without any bad faith on the broker's part, the latter was entitled to commissions, though, without the principal's fault, the vendee failed to perform the con-

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tract, solely because of the lack of financial responsibility at the time the contract was executed."

It will be observed that the case just stated was one in which the contract was made between the vendor and the purchaser without any representations on the part of the broker as to the purchaser's responsibility; while in the case before us the proof is that representations as to the purchaser's responsibility were made by the broker and were relied on by the seller. In the same section it is said, that "where a vendor of land is not influenced by misrepresentations of his broker as to the financial condition of his vendee, such misrepresentations do not constitute a ground for refusing to pay the broker's commissions." Citing *Irwin* v. *Mowbray*, 5 N. Y. Supp. 430.

When we speak of misrepresentation we do not mean to say that there is any evidence proving or tending to prove that the plaintiff in error knowingly deceived the defendant in error, but merely that the evidence tends to prove that the plaintiff in error represented to its principal that Casto was a purchaser ready, able and willing to buy, and financially responsible for his contracts.

We are of opinion that the third and fourth instructions were also properly refused.

This brings us to the consideration of a question of grave importance to a proper decision of this case. Ardan having accepted Casto as a purchaser upon the faith of the representations of his financial responsibility made to him by plaintiff in error, and Casto having refused to comply with his contract, was it the duty of Ardan, under the facts disclosed by this record, to bring suit against Casto, either to compel him to perform his contract or to recover damages for its breach, and was that question properly submitted to the jury?

The instruction bearing upon this point, which was given by the court, is as follows:

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"If the jury believe from the evidence in this case that the defendant, after the investigation as to whether a suit against Casto would be available to compel him to comply with his contract, *and* was advised by his counsel that a suit would be expensive and useless and would avail him nothing, then he was not bound to bring a suit against Casto, as the law does not compel a man to do a vain and useless thing."

The effect of this instruction was to leave it to the discretion of Ardan's counsel to determine whether or not it was the duty of his client to bring a suit against Casto to compel a compliance with his contract, and this we think was improper. In order to excuse himself from the duty of bringing the suit, an investigation should have been made as to the facts bearing upon the advisability of instituting such an action, and all the facts obtainable upon that question should have been submitted to the jury; and if as a result it should have been made to appear that a suit would have been unavailing, Ardan would have been excused for declining to institute it, for the law does not compel a man to do a vain and useless thing.

We are of opinion that for the error committed with respect to instruction No. 1 given by the court, the judgment should be reversed and the cause remanded for a new trial to be had not in conflict with the views stated in this opinion.

Reversed.

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Wytheville

MURGUIONDO v. NOWLAND'S EXECUTOR AND OTHERS.

June 12, 1913.

1. WILLS—*Execution—Signature of Testator—Place of Signature—Case in Judgment.*—The will of a testatrix was written on six sheets of paper. When the attesting witnesses were called upon to witness the execution of the will, each one of the sheets of paper upon which the will appears, except the last, had already been signed by the testatrix, who, in the presence of the witnesses affixed her signature to the margin of the last sheet nearly opposite the end of the will and above the concluding clause. The subscribing witnesses then attested the will in the usual form. These witnesses in their testimony before the jury, establish every formality required by the statute law of this State with respect to the execution of a will.

   Held: The will was signed by the testatrix in such manner as to make it manifest that the name was intended as a signature and the will was duly executed. No man publishes an instrument as his last will and testament, and calls on witnesses to attest the fact, until he has completed the act. The attestation must be annexed or subscribed to a complete instrument, to which, when so subscribed, no additions can be made. To the act itself the law attaches testamentary intent, that it is a concluded instrument, and if the party is under no restraint, acts freely, and is of sane mind, no further proof is requisite to sustain the instrument as a will.

Error to a judgment of the Chancery Court of the city of Richmond on a motion to admit a will to probate. Judgment for the executor. One of the defendants assigns error.

Affirmed.

The opinion states the case.

R. R. Hicks and *H. M. Smith,* for the plaintiff in error.

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Meredith & Cocke and *Leake & Buford*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

Robert E. Macomber, named as executor in a certain paper writing dated March, 1910, offered it for probate in the chancery court of the city of Richmond as the last will and testament of Bettie W. Nowlan. All of the parties interested in the probate were summoned to appear before the court, a jury was asked for and impaneled, and the testimony of the subscribing witnesses having been introduced, Mary de Murguiondo, one of the parties contesting the will, demurred to the evidence; but the court overruled the demurrer and entered a judgment declaring the said paper writing so offered to be the true last will and testament of Bettie W. Nowlan, deceased; and thereupon a writ of error was awarded the appellant.

The paper which was produced and probated as the will of Bettie W. Nowlan, deceased, is written upon several sheets, and upon the margin of each sheet appears the name of Bettie W. Nowlan. When the attesting witnesses were called upon to witness the execution of the will, each one of the sheets of paper upon which the will appears, except the last, had already been signed by the testatrix, who in the presence of the witnesses affixed her signature to the margin of the last sheet nearly opposite to the end of the will, which concludes as follows:

"Witness my hand and seal, which I have set to this my will, consisting of six pages of paper, each of which bears my signature in the margin thereof, on this the day of March, 1910, at Richmond, Virginia.

[SEAL]"

Then follows the attestation of the witnesses as follows:

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"Signed, sealed, published and declared by Bettie W. Nowlan, as and for her last will and testament, in the presence of both of us, both being present at the same time, and both of us in her presence and at her request and in the presence of each other have hereunto subscribed our names as witnesses.

"HUGH W. JONES,
"E. G. THOMAS."

In their testimony before the jury, these witnesses to the will established every formality required by the statute law of this State with respect to the execution of a will, and the sole question for our determination is whether a signature of the testatrix upon the margin of the will is such a signature as is contemplated by our statute.

Our statute of wills, which is found in section 2514 of the Code, as originally passed, was, as is stated by Judge Allen in *Waller* v. *Waller*, 1 Gratt. (42 Va.) 465, 42 Am. Dec. 564, a transcript of 29 Car. II, with the exception that it dispenses with subscribing witnesses in cases of wills wholly in the handwriting of the testator, while the English statute required the will to be attested and subscribed by three or more credible witnesses, in holographic as well as in other wills. In 1849 our statute was amended by the introduction of the words, "in such manner as to make it manifest that the name is intended as a signature." There have been numerous cases before this court arising under that statute, but they were all cases of unattested holograph wills.

In *Ramsey* v. *Ramsey*, 13 Gratt. (54 Va.) 664, 70 Am. Dec. 438; *Roy* v. *Roy*, 16 Gratt. (57 Va.) 418, 84 Am. Dec. 696, and *Warwick* v. *Warwick*, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775, it was held that the name of the testator appearing in the will was not placed there "in such manner as to make it manifest that the name was intended as a signature," and the wills were rejected.

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Dinning v. *Dinning,* 102 Va. 467, 46 S. E. 473, was also a holograph will, in which the name of the testator appeared as follows: "I, William Dinning, say this is my last will and testament," and it was held to be sufficiently signed. Judge Harrison, delivering the opinion, said: "The signature is at the end of an apparently completed instrument, and followed by only eight words, which do not indicate a purpose to add anything more, or to take anything from what had been written, but understood according to their usual acceptation, constitute an emphatic declaration that the signature was intended to authenticate all that had preceded it, as the final consummation of the testator's purpose."

The will under consideration is an attested will, and the Virginia cases we have thus far referred to shed but little light upon the question to be decided.

Waller v. *Waller, supra,* was also a case of an unattested holograph will, but in the discussion of the case Judge Allen goes into the whole subject very fully and with his accustomed learning and ability, and his opinion sheds a flood of light upon the case under consideration, even though strictly speaking it may, with respect to attested wills, be considered in some degree *obiter.* The will in *Waller* v. *Waller* was a holograph will, in which the name of the testator appears only in the exordium: "In the name of God, amen, I, John Waller, of the county of Henry and State of Virginia . . . being desirous to dispose of all such worldly estate as it hath pleased God to bless me with, I give and bequeath the same in manner following." There was no end signature, it was unattested and the will was rejected. Judge Allen, in his opinion, says: "The act of 1840 requires written wills, whether of real or personal estate, to be executed with the same solemnities. That law governs this case, and relieves us from many of the inconveniences growing out of the admission

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of parol testimony to prove the testamentary intent. The will, whether of realty or personalty, is a statutory disposition of the property. The very paper must have been intended as and for the last will. Where the legal formalities are complied with, it stands as the last will, unless cancelled or revoked in the mode prescribed. If those formalities are wanting, parol testimony as to testamentary intent cannot supply the defect. It is the policy of the law to guard against setting up or destroying wills by such testimony. . . . The inquiries now to be made in regard to a paper offered for probate relate to the connection of the instrument with the testator so as to guard against forgery, the presence of those formalities required to establish its finality, and the sanity and freedom of the testator to show his knowledge of the character of the act, his capacity to do it, and the absence of all improper constraint and influence.

"In attested wills the connection between the testator and instrument is shown by the signing. Where the attesting witnesses prove he signed the instrument, or another in his presence by his direction signed it for him, the fullest evidence is obtained that the very paper produced is the one executed.

"The force of this evidence was somewhat impaired, when the courts held that it was not necessary the subscribing witnesses should see him sign, provided he acknowledged the signature to the paper they attested; as a mere acknowledgment was not so likely to be impressed on the mind as a formal execution in their presence.

"As the identity or connection of the instrument with the testator is the main fact to be determined by the proof of signing, there was not much danger to be apprehended in considering a signing of such a will at the top, the whole being in his handwriting, as a sufficient signing. Proof of the handwriting of itself connected the tes-

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tator with the instrument, and that proof was aided by the acknowledgment of the testator in the presence of the subscribing witnesses. . . .

"The connection of the testator with the instrument being thus ascertained in the various modes adverted to, the finality of an attested will is established by the publication and attestation. No man publishes an instrument as his last will and testament, and calls on witnesses to attest the fact, until he has completed the act. The attestation must be annexed or subscribed to a complete instrument, and to which, when so subscribed, no additions can be made. To the act itself the law attaches testamentary intent that it is a concluded instrument, and if the party is under no restraint, acts freely, and is of sane mind, no further proof is requisite to sustain the instrument as a will; and no proof, other than a revocation in the mode prescribed, will be received to show a change of testamentary intent."

It would seem, therefore, from the opinion of Judge Allen, that the main fact of the connection of the testator with the instrument may be established, not only by the signature of the testator in the presence of subscribing witnesses, but by the mere acknowledgment in their presence of his signature; that such proof has been deemed sufficient in all the later cases; and that the finality of an attested will is established by attestation and publication; for, to repeat a pregnant sentence in the opinion of Judge Allen, "no man publishes an instrument as his last will and testament, and calls on witnesses to attest the fact, until he has completed the act. The attestation must be annexed or subscribed to a complete instrument, and to which, when so subscribed, no additions can be made."

Meads v. *Earle,* 205 Mass. 553, 91 N. E. 916, 29 L. R. A. (N. S.) 63, was an appeal from a decree of the probate

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court disallowing an instrument as the last will of Sarah J. Armstrong. The appellee requested the judge to rule as matter of law that the instrument was not signed by the testatrix and attested and subscribed in her presence by three competent witnesses in accordance with the requirements of the statute. The judge declined so to rule, and found as facts that so far as the will is in manuscript, the handwriting including her name or signature is that of Sarah J. Armstrong; that although she did not sign at the end of the instrument, yet when she wrote her name at the beginning of the will, it was with the intention that this act was a signing of the will; that independently of the attestation clause, she by words and conduct acknowledged and declared the will before the subscribing witnesses; and that the subscribing witnesses signed the attestation clause in her presence at her request and upon her acknowledgment and declaration that it was her will, although neither of them saw her signature. Having so found, he ruled that the document was signed, attested and subscribed within the meaning of the statute, and that it was a valid will." The supreme court said: "The case is before us upon his report. If the ruling requested by the appellee should have been given, a decree is to be entered affirming the decree of the probate court; otherwise a decree is to be entered reversing that decree, admitting the will to probate and remanding the case to that court for further proceedings." In the course of the opinion it is said: "There can be no doubt that she intended to make and supposed she had made a valid will. The care she took in writing the paper, in seeing to its attestation, and in putting and keeping it in a safe place shows that. She does not appear to have been advised or assisted by any one. She personally superintended the whole work. There was, however, no signature at the end; and it is contended by the contestants that the single

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justice was not warranted in finding that she wrote her name at the beginning *animo signandi.*

"The finding must be interpreted to mean not simply that after writing her whole will she adopted as her signature her name as written previously in the exordium, but that at the time she wrote her name there she intended that it should stand as her signature to the will when completed, and that this intent continued to the end. Such a finding is perfectly consistent with what she did, and is not inconsistent with any act of hers. It explains any apparent incongruity in the evidence. It welds all the circumstances into one harmonious whole and is supported by the evidence."

It is to be borne in mind that when the attesting witnesses were called upon in this case five sheets of the will had been identified by the signature of the testatrix upon the margin of each page; and that in the presence of the witnesses she affixed her name for the sixth and last time to the margin of the will as and for her signature, and declared it to be her last will and testament. The jury by their verdict have declared that the will was duly executed, the judge of the probate court has approved their verdict, and we have no choice but to affirm the decision, unless we are prepared to hold that a literal signing at the foot or end of the instrument is necessary in all cases, and this we are not prepared to do.

We gather from our statute, from the decisions of this and other courts, and especially from the opinion of Judge Allen in *Waller* v. *Waller*, that in holographic wills proof of the handwriting establishes the identity of the paper and the connection of the maker of the will with it; that the finality of such will depends upon the signature, which must be made "in such manner as to make it manifest that the name is intended as a signature"; and that in the case of attested wills not in the handwriting of the testator,

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the instrument is incomplete until attested by two witnesses in the mode prescribed by section 2514 of the Code; that when so attested it becomes a complete and final testamentary act; for, again to quote the language of Judge Allen, "the attestation must be annexed or subscribed to a complete instrument, and to which, when so subscribed, no additions can be made. To the act itself the law attaches testamentary intent, that it is a concluded instrument, and if the party is under no restraint, acts freely, and is of sane mind, no further proof is requisite to sustain the instrument as a will."

We are of opinion that the judgment complained of should be affirmed.

Affirmed.

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Syllabus.

Richmond

NORFOLK AND PORTSMOUTH TRACTION CO. v. CITY OF NORFOLK.

January 16, 1913.

On Petition to Rehear, June 12, 1913.

1. STREET RAILWAYS—*Charter Powers—Strict Construction.*—The charter of a street railway company has the elements of a contract and is to be strictly construed against the company. The company has no doubtful rights under its charter, for when there are doubts they are construed against the company and in favor of the city.
2. STREET RAILWAYS—*Paving Streets—Character of Paving.*—The obligation of a street railway company to keep its portion of the streets "well paved and in good repair" necessarily involves the duty to keep pace with the growth and progress of the city, and to conform its work to the policy of the city in the matter of street improvement. The railway company must put its portion of the street in the same condition as the rest of the street, even though that necessitates the laying of a new pavement.
3. STREET RAILWAYS—*Paving Streets—Proportion of Expense.*—Where a street railway company is bound by law to keep the space between its rails and for two feet beyond them well paved, which part of the paving is more costly than the rest of the street, the extra and separable expense of such part of the paving should be assessed exclusively to the company; and such company is not entitled to be relieved from a tax for paving the street by paving the proportion thereof which the width which it is obliged to pave bears to the width of the whole street.
4. MUNICIPAL CORPORATIONS—*Power of State Over Streets—Paving by Street Railway—Charter Obligation—Release by Ordinance—Ultra Vires Act.*—The powers of a municipal corporation with respect to its streets are continuing and inalienable, and where the charter of a street railway company imposes upon the company the duty of keeping certain portions of the streets well paved and in good order, without expense to the city, a city ordinance which undertakes to relieve the company of such duty, in whole or in part, is *ultra vires* and void. The legislature has supreme control over streets, subject to constitutional re-

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strictions, while to the city is delegated the power to hold them as trustee for the general public and to keep them in repair for public convenience and safety.

5. MUNICIPAL CORPORATIONS—*Ultra Vires Ordinance—Estoppel.*—If a city ordinance be *ultra vires* and void, it cannot operate as an estoppel.

ON A REHEARING.

6. APPEAL AND ERROR—*Points Not Raised Below.*—Exceptions of every kind, when necessary at all, should be taken in the trial court. They cannot be taken for the first time in the appellate court. The appellate court can only review the case made and as made by the parties in the court below. If it were otherwise the appellate court would be converted into a court of original jurisdiction.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Henry W. Anderson and *Walter H. Taylor,* for the plaintiff in error.

Geo. C. Cabell, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This is an action of assumpsit brought by the defendant in error, the city of Norfolk, against the plaintiff in error, the Norfolk and Portsmouth Traction Company, to recover by way of damages the cost of materials and labor furnished and done by the plaintiff in laying wood block paving, in repaving between and for two feet beyond the outer rails of the defendant's tracks on Granby street, and for similar repaving with wood block and bitulithic paving

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on Botetourt street; also for furnishing materials and laying extra concrete base under the defendant's tracks in connection with such repaving. The defendant paid the cost of labor for the work, but denied liability for the cost of materials. There was a verdict and judgment for the plaintiff for $22,060.93, to which judgment this writ of error was awarded.

The question for our determination is whether the defendant is responsible for the cost of materials furnished by the plaintiff.

On January 4, 1866, the General Assembly incorporated the Norfolk City Railroad Company, the predecessor of the plaintiff in error, granting the company the privilege of laying its tracks in the streets of the city of Norfolk, but upon condition that the consent of the council of the city should be first obtained. Clause 3 of the charter provides: "That said company shall keep that portion of the street occupied by its track or tracks, embracing the space between said tracks and a distance of at least two feet beyond the outer rails thereof, well paved and in good repair, without expense to the corporation of the city of Norfolk; and the rails used for said tracks shall be of the most approved pattern for such purposes; and shall be laid at the distance of five feet five inches between the outer ridges or flanges thereof, so as to form as little obstruction as practicable to the passage of carriages or other vehicles along or over said tracks."

This controversy arises not so much over the interpretation of the foregoing clause (the language of which is free from ambiguity) as it does with respect to the attempted modification of the obligations thereby imposed upon the company by section 9 of an ordinance passed by the city council December 14, 1887.

Section 9 is as follows: "The said railway shall be so made and laid down as to conform to the established,

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or proposed, grades of the several streets to be occupied by it, as given by the city engineer; and in case the several streets occupied by it shall, in the future, be paved, or repaved, the city of Norfolk shall furnish and deliver the material therefor upon said streets and have the work done; but the proprietors, or lessees, of said railway shall pay the said city for the cost of labor for paving the same between the tracks and two feet on each side thereof, such amount, in case of non-payment by the company for a period of thirty days after the work is done, to be recoverable by legal proceedings in the name of the city. And in case the grade of said streets, or any of them, or of any part thereof, shall be changed hereafter, the proprietors or lessees of the said railway, at their own expense, shall make corresponding alterations of the said tracks; and the owners, proprietors or lessees of the said railway shall keep the streets covered by said tracks, and extending two feet on the outer limits of each side of said tracks, in thorough repair at their own expense."

We have no difficulty in reaching the conclusion that as an original proposition the predecessor of the defendant was under charter obligation to keep its portion of the streets, as therein defined, well paved and in good repair, and at its own expense. The charter so declares in language too plain to call for construction or to admit of controversy. See also Va. Code, 1904, sec. 1294-i (3), which authorizes a street railway company, with the consent of the municipal authorities, to lay its tracks in the streets, but likewise imposes upon such company the duty to restore the pavements of the streets and to maintain them in good condition.

The apparent conflict among the authorities on the subject of the extent of the liability of these companies is due to differences in the language of their charters.

For example, in the case of *Chicago* v. *Sheldon*, 9 Wall.

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54, 19 L. Ed. 594, so much relied on by the plaintiff in error, the charter there construed was quite different from this charter. It required the company to keep its portion of the street "in good repair," while the language here employed is to keep it "well paved and in good repair."

In construing language similar to that found in the present charter, in cases arising in some of the most progressive and important cities of the country, the trend of the more recent and best considered decisions is to hold street railway companies to a high degree of responsibility and strict compliance with their charter duties in relation to their occupancy of streets. The courts proceed upon the theory that franchises granted to such companies are in derogation of common right, and are considered an encroachment upon the primary use of the streets by the public; and the principle is fundamental that such grants are to be construed most strongly against the grantee. Hence it is said: "A charter, having the elements of a contract, granted to a street railway company, is to be strictly construed against the company, and it has no doubtful rights under such charter; for when there are doubts they are construed against the grantee and in favor of the city." *Western Paving and Supply Co.* v. *Citizens' St. R. Co.*, 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, 25 Am. St. Rep. 462. The decisions of the Supreme Court of the United States are especially pronounced in maintaining this construction. *St. Clair, &c.*, v. *Illinois*, 96 U. S. 63, 24 L. Ed. 651; *Oregon R. & N. Co.* v. *Oregonian R. Co.*, 130 U. S. 1, 26, 32 L. Ed. 837, 9 Sup. Ct. 409; *Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22, 50 L. Ed. 353, 26 Sup. Ct. 224.

As corollary to this canon of construction, it is the accepted doctrine that the obligation resting upon a street railway company to keep its portion of the streets "well paved and in good repair" (or language of like import)

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necessarily involves the duty to keep pace with the growth and progress of the city, and to conform its work to the policy of the municipality in the matter of street improvement. Hence, for a company to pave with cobble-stones could not be regarded as a compliance with its duty to keep its part of the street "well paved and in good repair," where the rest of the street is laid with wood block or bitulithic pavement.

In *District of Columbia* v. *Washington R. R. Co.*, 4 Mackey (D. C.) 214, it was held: "That where a street railway company's charter required it to keep its tracks, and the space between the rails and two feet outside, well paved and in good repair, it could be required to construct a pavement where one did not exist before its road was built, and to construct such kind of pavement as the authorities should direct."

So in the case of *Mayor of the City of New York* v. *Harlem Bridge M. & F. Ry. Co.*, 186 N. Y. 304, 78 N. E. 1072, the clause of the charter provided: "The said grantees or their successors shall keep the surface of the street inside the rails and for one foot outside thereof, in good and proper order and repair, and conform the tracks to the grades of the streets or avenues as they now are or may hereafter be changed by the authorities of the aforesaid towns." The court construing this clause says: "While this statute does not itself specify, as in the case of the railroad law, that this shall be done under the supervision of the municipal authorities and in accordance with their specifications, that necessarily follows from the general duties and powers conferred upon such authorities by law. Therefore, when the proper authorities, in view of the condition of the street as shown to exist, decided that a granite block pavement should be laid, we think that the requirement for repairing and keeping in good order compelled the defendant to co-operate with the city,

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and put the space between its rails in the same condition as the rest of the street, even though that necessitated the laying of a new pavement. It has been held elsewhere by this court that an obligation, couched in substantially similar language, resting upon a railroad company, will compel it under proper conditions to lay a new kind of pavement. . . . The question of what shall constitute keeping a pavement in the tracks of a railroad company in good order and repair is to be determined somewhat at least by reference to existing and surrounding conditions, and in our judgment it would be altogether too narrow a view to hold that where a municipality had for sufficient reason decided to pave a street with asphalt or other new pavement a railroad might discharge its obligations to keep its part of the street in good order and repair by merely patching up a dirt road or some species of pavement which had become antiquated and out of condition and which was entirely different from that adopted in the remainder of the street." *Columbus St. Ry. Co. v. City of Columbus*, 43 Ind. App. 265, 86 N. E. 83; *City of Reading* v. *United Traction Co.*, 215 Pa. St. 250, 64 Atl. 466; *City of Philadelphia* v. *Thirteenth, &c., Street Pass. Ry. Co.*, 169 Pa. 269, 33 Atl. 126; 2 Elliott Roads and Streets, sec. 987.

It is conceded that the materials furnished and work done on the extra concrete base were rendered necessary by the increased size and weight of the defendant's rails and rolling stock, and was of no benefit to the city except to prevent damage to the surface of the street from inadequate foundation.

The case in that aspect is controlled by the case of *Washington & Georgetown Ry. Co.* v. *District of Columbia*, 108 U. S. 807, 27 L. Ed. 807, 2 Sup. Ct. 865. The court there held: "Where a street railway company is by law bound to keep the space within its tracks and for two feet

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beyond them well paved, which part of the paving is more costly than that of the rest of the street, the extra and separable expense of such part of the paving should be assessed exclusively to the company; and such company is not entitled to be relieved from a tax for paving the street by paying the proportion thereof which the width which it is obliged to pave bears to the width of the whole street."

We shall next consider the contention of the plaintiff in error, that, whatever may have been its original charter obligations, it has been released by the city ordinance from all responsibility in the matter of paving its part of the streets, except only the liability to pay the city the cost of labor in doing the work.

We are of opinion that the paving and repairing clause of the charter is mandatory; and that the city ordinance which undertakes to repeal it, in whole or in part, is *ultra vires* and void. The General Assembly in granting the charter, saw fit to impose upon the company the duty of keeping the part of the streets occupied by its tracks, as therein defined, "paved and in good repair without expense to the corporation of the city of Norfolk," and the city council had no power to shift that burden from the company to the municipality.

It is said, however, that this controversy is only between the city and the company, and, therefore, that the State is not interested in the result; and that the city is estopped to question the validity of its own ordinance. The question is not one of policy, as to whether the expense shall be borne by the city or the company, but of power. If the city has power to relieve the company from one of its mandatory charter obligations, it has power to relieve it from all; and any argument that leads to such a result cannot be sound. If the ordinance be *ultra vires* and void, it cannot, of course, operate as an estoppel.

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In *Roanoke Gas Co.* v. *Roanoke,* 88 Va. 810, 14 S. E. 665, it was held that the powers of a municipal corporation with respect to its streets are continuing and inalienable."

So, in *Basic City* v. *Bell,* 114 Va. 157, 76 S. E. 336, it was doubted whether the doctrine of equitable estoppel exists in this State as regards the powers and obligations of a municipal corporation over its streets.

In *City of Reading* v. *United Traction Company,* 215 Pa. St. 250, 380, 64 Atl. 446, 7 Ann. Cas. 380 (see also notes to the principal case), it was held that a street railway company, in the absence of express contract or statutory direction, is bound to keep the portions of the streets occupied by its right of way in proper repair. The court also observes: "That the streets of a city belong to the State for the use of the people at large. To the municipality, as its agent, it commits the duty of at all times keeping them in proper repair for the convenience and safety of the public. This duty of the municipality does not shift, except when it is expressly or impliedly imposed upon another." *City of Richmond* v. *Smith,* 101 Va. 161, 43 S. E. 345; *Bellenot* v. *City of Richmond,* 108 Va. 314, 61 S. E. 785; *White Oak Coal Co.* v. *City of Manchester,* 109 Va. 749, 64 S. E. 944, 132 Am. St. Rep. 943.

These principles are grounded upon the general proposition that the legislature, subject only to constitutional limitation, has supreme control over streets and highways; while, on the other hand, the power of a municipality is wholly dependent upon and measured by delegation from the government, and is held and exercised in subordination to its will. The one exerts sovereign power, the other granted power, and holds its streets as trustee for the general public.

The opinion handed down at the present term in the case of *Danville* v. *Danville Ry. & Elec. Co.,* 114 Va. 482, 76 S. E. 913, is in harmony with the views herein expressed.

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Upon the whole case, we are of opinion that the judgment is without error and should be affirmed.

Affirmed.

UPON PETITION TO REHEAR.

By the Court: The specific ground upon which a rehearing of this case is sought is because, it is said, the Traction Company was not called on in the first instance by the city to repave its portion of the streets. And granting that the company was under charter obligation to do such repaving, nevertheless until after notice it had refused to comply with such demand, the city had no authority to do the work at the company's expense; and, therefore, could not maintain an action to recover the cost of the work done.

It is said that this proposition is so plainly correct that it is unanswerable; and complaint is made that it was not noticed in the opinion of the court.

The omission was not an inadvertence; the assignment was not discussed in the opinion simply because no such question was properly raised by the record, and it was, therefore, not within the cognizance of an appellate court. So far as the record discloses, no such defense was relied on in the trial court, and no exception was taken on that ground. If the question had been raised in the lower court, *non constat* but that the city could readily have proved notice and demand. The company "was silent when it should have spoken; and it will not be heard to speak when it should be silent."

It affirmatively appears from the agreed statement of facts that "the question involved in this case is the liability of the Norfolk and Portsmouth Traction Company for the cost of the material used in laying wooden blocks on the portion of Granby street and Botetourt street lying

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between the tracks and two feet on each side thereof, in the year 1910, and for the cost of the material in an extra concrete foundation under the tracks."

It is a fundamental rule of practice that "exceptions of every kind, when necessary at all, should be taken in the court whose judgment is to be reviewed. Otherwise the appellate court would be converted into one of original jurisdiction." See note to *Warren* v. *Warren,* 2 Va. L. Reg. 195-6.

Burks, J., in *Redd* v. *Supervisors,* 31 Gratt. (72 Va.) 685, at p. 711, observes: "We can only review the case made and as made by the parties in the court below. We cannot go outside of the record and decide a case upon *facts dehors.* This would, in my judgment, be a palpable and flagrant abuse of appellate jurisdiction."

So also in *Camden* v. *Doremus,* 3 Howard 515, 11 L. Ed. 705, it was said: "It would be more extraordinary still if, under the mask of such an objection or mere hint at an objection, a party should be permitted in the appellate court to spring upon his adversary defects which it did not appear he ever relied on, and which, if they existed and had been openly and specifically alleged, might have been easily cured." *Warren* v. *Warren,* 93 Va. 73, 24 S. E. 913; *Lambert* v. *Jenkins,* 112 Va. 376, 372, 71 S. E. 718.

Authorities could be multiplied upon this obvious and settled rule of appellate practice, but the foregoing sufficiently illustrate it.

It was upon these considerations that the court did not feel called upon to notice in its opinion the assignment to which attention is now invited.

Rehearing denied.

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Wytheville

PHILLIPS AND OTHERS v. CITY OF PORTSMOUTH.

June 12, 1913.

1. TAXATION—*Corporations—Capital Stock.*—Whatever obscurity or confusion may exist elsewhere as to the meaning of the term "capital stock," its meaning is put beyond controversy in the case at bar, for it is expressly charged in the declaration that the whole of the capital stock of the company was invested in and represented by the property and works necessary for the supply of water, and a tax upon the capital stock, in the sense in which it is used in the declaration, was undoubtedly a tax upon the property in which it was invested.
2. CHOSES IN ACTION—*Open Accounts—Assignments—Action by Beneficial Owner.*—A debt due from another, though evidenced by an open account, is a chose in action, and the beneficial owner thereof may maintain an action therefor in his own name under the provisions of section 2800 of the Code.
3. TAXATION—*Exempting Property—Water Rents—Increased Rate—Municipal Corporations.*—An agreement by a city to pay to a water company a stipulated sum for water rent, and that if at any time a city tax for any purpose be imposed upon any of the property or works of the company necessary for the supply of water, the rental stipulated for shall be increased to an amount equal to said tax, is not an agreement to exempt said works and property of the water company from taxation, but is an arrangement for ascertaining the amount of water rent to be paid by the city, and is such a contract as the city may lawfully enter into.
4. TAXATION—*Penalty for Delay in Payment—Involuntary Payment.*—The payment of a tax in order to avoid a penalty imposed to accelerate the prompt payment of taxes is not such duress as to render the payment involuntary, and the payment cannot be recovered back.

Error to a judgment of the Circuit Court of the city of Portsmouth in an action of assumpsit. Judgment for the defendant. Plaintiff assigns error.

Reversed.

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The following is a copy of the plaintiff's declaration:

A. J. Phillips and T. J. Wool, plaintiffs, complain of the city of Portsmouth, defendant, of a plea of trespass on the case in assumpsit, for this, to-wit, that heretofore, to-wit: On the 13th day of September, 1887, the Portsmouth and Suffolk Water Company and the city of Portsmouth entered into a contract under seal, and to the court here shown, by which, for valuable consideration, the Portsmouth and Suffolk Water Company agreed to complete certain works for the supplying of the city of Portsmouth with water, and by which the said city of Portsmouth covenanted, amongst other things, that the Portsmouth and Suffolk Water Company, faithfully performing its part of said contract, it, the said city of Portsmouth, would pay to the said Portsmouth and Suffolk Water Company, for water supplied to certain hydrants described in said contract and for public purposes and uses set out in said contract, the sum of $7,500.00 *per annum,* or at the rate of $75.00 per hydrant, per year, payable every three months during the first ten years of said contract, and for each additional hydrant over and above 100 it, the said city of Portsmouth, would pay to the said Portsmouth and Suffolk Water Company, at the rate of $75.00 per hydrant *per annum,* during the first ten years of said contract, and that for the next ten years of the existence of said contract, it, the said city of Portsmouth, would pay to the said Portsmouth and Suffolk Water Company the sum of $50.00 per hydrant *per annum,* for each hydrant then set by the authority of the city of Portsmouth, or thereafter set or to be set by the authority of the city of Portsmouth, within the corporate limits of said city of Portsmouth, payable every three months, and the said plaintiffs say that said contract further provided that if at any time any city taxes, levies or assessments for any public purpose should be imposed on the property or works necessary for

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the supply of water, as set out in said contract, the annual rental above set out should be increased to an amount equal to said city taxes, levies or assessments (paving assessments excepted); and the said plaintiff says that the Portsmouth and Suffolk Water Company furnished water to said hydrants for the use of said city during the years 1901, 1902, 1903 and 1904, in accordance with said contract, and faithfully performed its part of said contract; and that during the years 1901, 2, 3 and 4 city taxes for public purposes were imposed to the amount of $1,312.50 for each of said years on the capital stock of the Portsmouth and Suffolk Water Company, all of which capital stock was invested in and represented by the property and works necessary for the supply of water, amounting in the aggregate for said four years to $5,250.00, which said amounts were paid as follows: On October 31, 1901, $1,312.50; on October 31, 1902, $1,312.50; on October 31, 1903, $1,312.50, and on October 31, 1904, $1,312.50 by the said Portsmouth and Suffolk Water Company to the city of Portsmouth; whereby and by reason of said contract the city of Portsmouth became indebted to the Portsmouth and Suffolk Water Company during the year 1901 in the sum of $1,312.50; in the year 1902, in the sum of $1,312.50; in the year 1903, in the sum of $1,312.50, and in the year 1904, in the sum of $1,312.50, aggregating the sum of $5,250.00, in addition to the annual rental for said hydrants; and the said plaintiffs say that while said city of Portsmouth paid the said Portsmouth and Suffolk Water Company the annual rental of $50.00 per hydrant as hereinabove set out, it wholly neglected and refused to pay said additional rentals of $1,312.50 for each of said years of 1901, 2, 3 and 4; and the said plaintiffs further say that in the year 1902 the said Portsmouth and Suffolk Water Company was, pursuant to an act of the General Assembly of Virginia, consolidated with the Berkley and South

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Norfolk Water and Electric Light Company and the Nansemond Water Company, so as to form one company, by the name of the Portsmouth, Berkley and Suffolk Water Company, by means whereof the Portsmouth, Berkley and Suffolk Water Company became vested with all the property, property rights, franchises and privileges of said Portsmouth and Suffolk Water Company, and subject to all the responsibilities of said company; and that subsequently, to-wit, on or about the 17th day of April, 1911, the said Portsmouth, Berkley and Suffolk Water Company assigned unto the plaintiffs said claim against the defendant, together with interest thereon; by means whereof the said city of Portsmouth then and there became liable to pay to the said plaintiffs said sums aggregating the sum of $5,250.00, with interest on $1,312.50, a part thereof, from the 31st day of October, 1901, and on $1,312.50, another part thereof, from the 31st day of October, 1902, and $1,312.50, another part thereof, from the 31st day of October, 1903, and $1,312.50, the residue thereof, from the 31st day of October, 1904; and, being so liable, it, the said defendant, in consideration thereof, undertook and then faithfully promised to pay the said plaintiffs the said sum of $5,250.00, with interest as aforesaid, when it, the said defendant, should be thereunto afterwards requested.

Yet the said defendant, not regarding its said promises and undertakings, did not nor would it at the said time, when it was so requested and demanded, nor at any other time, before or afterwards, pay said plaintiffs the sums aforesaid, or any part thereof, but hath hitherto neglected and refused and still doth neglect and refuse, to the damage of the plaintiff $10,000.

And for this also, to-wit: That heretofore, to-wit, on the day and year aforesaid, the said city of Portsmouth entered into a contract in writing and sealed with its seal, and to the court here shown, with the Portsmouth and

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Suffolk Water Company by which it, for valuable considerations, agreed that the said Portsmouth and Suffolk Water Company, faithfully performing its part of said contract, would pay to the Portsmouth and Suffolk Water Company, for water supplied to certain hydrants described in said contract, the sum of $7,500.00 *per annum,* at the rate of $75.00 per hydrant per year, payable every three months during the first ten years of said contract, and for each additional hydrant over and above 100, it, the said city of Portsmouth, would pay to the said Portsmouth and Suffolk Water Company, at the rate of $75.00 per hydrant *per annum,* during the first ten years of said contract, and that for the next ten years of the existence of said contract, it, the said city of Portsmouth, would pay to the said Portsmouth and Suffolk Water Company the sum of $50.00 per hydrant *per annum* for each hydrant then set by the authority of the city of Portsmouth, or thereafter set or to be set by the authority of the city of Portsmouth, within the corporate limits of said city, payable every three months; and the said plaintiffs say that said contract further provides that if at any time any city taxes, levies or assessments for any public purposes should be imposed on the property or works necessary for the supply of water, as set out in said contract, the annual rental above set out should be increased to an amount equal to said city taxes, levies or assessments (paving assessments excepted), and the said plaintiffs say that it furnished water to the said hydrants during the years 1901, 2, 3 and 4 in accordance with the said contract and faithfully performed its part of said contract, and that during the years 1901, 2, 3 and 4 city taxes for public purposes were imposed to the amount of $1,312.50 for each of said years on the capital stock of the Portsmouth and Suffolk Water Company, which capital stock was invested in and represented by the property and works necessary for the supply

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of water, amounting in the aggregate for said years to $5,250.00, which said amounts were paid as follows: On October 31, 1901, $1,312.50; on October 31, 1902, $1,312.50; on October 31, 1903, $1,312.50, and on October 31, 1904, $1,312.50, by the said Portsmouth and Suffolk Water Company, to the said city of Portsmouth; and the said plaintiffs say that under the ordinance of the said city of Portsmouth, unless said taxes were paid on or before the 1st day of November of each year, that then a penalty of five *per cent.* of the amount of said tax will be imposed; and, to avoid said penalty, the said Portsmouth and Suffolk Water Company, on the 31st day of October, 1901, paid the amount of said tax, to-wit, the sum of $1,312.50, and on the 31st day of October, 1902, it paid the sum of $1,312.50, and on the 31st day of October, 1903, it paid the sum of $1,312.50, and on the 31st day of October, 1904, it paid the sum of $1,312.50; and the said plaintiffs say that said taxes assessed as aforesaid were illegal and were imposed without authority of law, and were paid as aforesaid to avoid said penalty of five *per cent.* under protest; and the said plaintiffs further say that in the year 1902 the said Portsmouth and Suffolk Water Company was, pursuant to an act of the General Assembly of Virginia, consolidated with the Berkley and South Norfolk Water and Electric Light Company and the Nansemond Water Company, so as to form one company by the name of the Portsmouth, Berkley and Suffolk Water Company, by means whereof the Portsmouth, Berkley and Suffolk Water Company became vested with all of the property, rights, franchises and privileges of said Portsmouth and Suffolk Water Company, and subject to all responsibilities of said company, and that subsequently, to-wit, on or about the 17th day of April, 1911, the said Portsmouth, Berkley and Suffolk Water Company assigned to plaintiffs said claim against the said defendant, together with interest thereon, by means whereof the said city of Portsmouth then and there became indebted and

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liable to the plaintiffs in the said sum of $5,250.00, with interest on $1,312.50, a part thereof, from the 31st day of October, 1901, on $1,312.50, another part thereof, from the 31st day of October, 1902; on $1,312.50, another part thereof, from the 31st day of October, 1903, and on $1,312.50, another part thereof, from the 31st day of October, 1904; and being so liable and indebted, it, the said defendant, in consideration thereof, undertook and then faithfully promised to pay to the said plaintiff the sum of $5,250.00, with interest as aforesaid, when it, the said defendant, should be thereunto afterwards requested.

Yet the said defendant, not regarding its said promises and undertakings, did not, nor would it at any time it was so requested and demanded, nor at any time before or afterwards, pay said plaintiffs the sums aforesaid, or any part thereof, but hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the plaintiffs, $10,000.00.

DEMURRER OF DEFENDANT AND THE GROUNDS THEREOF.

The said defendant says that the declaration in this action, and each and every count thereof, is not sufficient in law, and states the grounds of demurrer relied on to be as follows:

First: That the tax imposed by the city of Portsmouth on the capital stock of the Portsmouth and Suffolk Water Company for the years 1901, 1902, 1903 and 1904 was not a tax, levy or assessment imposed upon any property or works of the Portsmouth and Suffolk Water Company, or its successors, necessary for the supply of water, as contemplated by the provisions of the contract between the city of Portsmouth and the Portsmouth and Suffolk Water Company, as set out in the plaintiff's declaration, and hence there was no obligation on the defendant to pay the

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Portsmouth and Suffolk Water Company, or its successors, or the plaintiffs, the sums demanded in the declaration as increased hydrant rental.

Second: That the plaintiffs, not being parties to the contract between the defendant and the Portsmouth and Suffolk Water Company, mentioned in the declaration, and not being the assignees of said contract or of any part thereof, but the assignees of, if anything, only of a mere chose in action, to-wit: the additional rental alleged to be due by the defendant to the Portsmouth and Suffolk Water Company for the years 1901, 1902, 1903 and 1904, cannot maintain this action in their own names for the violation of any rights growing out of said contract.

Third: That the provision of the contract between the city of Portsmouth and the Portsmouth and Suffolk Water Company, mentioned in the declaration, that if at any time any city tax, levy or assessment for any public purpose shall be imposed upon any of the property or works of the company necessary for the supply of water, the rental agreed in said contract shall be increased to an amount equal to said city tax, assessment or levy, is in effect an exemption of the property or works of the said company necessary for the supply of water from city taxation, and did not pass to the Portsmouth, Suffolk and Berkley Water Company under the act of merger or consolidation of 1902.

Fourth: That the declaration does not allege facts sufficient to show that the payments of the taxes complained of were involuntary, or were made under such circumstances as would entitle the Portsmouth and Suffolk Water Company, or its successors, or the plaintiffs, to recover the same.

Fifth: That the plaintiffs not being the persons in whose name the taxes for the years 1901, 1902, 1903 and 1904, mentioned in the declaration, were assessed, or the persons who paid the same, they cannot maintain an action in their own names to recover them back.

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Sixth: And for other good and sufficient grounds.

R. Randolph Hicks, for the plaintiffs in error.

J. W. Happer and *Frank L. Crocker,* for the defendant in error.

KEITH, P., delivered the opinion of the court.

The first ground of demurrer to the declaration in this case is: "That the tax imposed by the city of Portsmouth on the capital stock of the Portsmouth and Suffolk Water Company for the years 1901, 1902, 1903 and 1904 was not a tax, levy or assessment imposed upon any property or works of the Portsmouth and Suffolk Water Company, or its successors, necessary for the supply of water, as contemplated by the provisions of the contract between the city of Portsmouth and the Portsmouth and Suffolk Water Company, as set out in the plaintiff's declaration. . . ."

One of the provisions of the contract set out in the declaration is that "if at any time any city taxes, levies or assessments for any public purpose should be imposed on the property or works necessary for the supply of water, as set out in said contract, the annual rental above set out should be increased to an amount equal to said city taxes, levies or assessments. . . ." Had the declaration stopped there, there would have been much force in the contention of the defendant, but it goes on to state that during the years 1901, 1902, 1903 and 1904 city taxes for public purposes were imposed to the amount of $1,312.50 for each of said years on the capital stock of the Portsmouth and Suffolk Water Company, all of which capital stock was invested in and represented by the property and works necessary for the supply of water, amounting in the aggregate for said four years to $5,250.00, which

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said amounts were paid. It would seem clear, therefore, that if the capital stock was invested in and represented by the property and works necessary for the supply of water, and the tax was levied upon the capital stock, that it was of necessity a tax upon the property and works necessary for the supply of water as set out in the contract.

In *Farrington* v. *State of Tennessee,* 95 U. S. 686, 24 L. Ed. 558, it is said: "The capital stock and shares of the capital stock are distinct things. The capital stock is money paid or authorized, or required to be paid as a basis of the business of the bank and the means of conducting its operations. It represents whatever it may be invested in."

And in *State Bank of Va.* v. *Richmond,* 79 Va. 115, it is said: "The capital stock and the shares of the capital stock are distinct things. The capital stock and shares may both be taxable and it is not double taxation."

As is said in the brief for the defendant in error, there is some confusion among the authorities in their definition of capital stock, the term sometimes being applied to the shares of stock in the hands of stockholders.

In Cook on Stock and Stockholders (2nd ed.), section 3, it is said: "Strictly the capital stock of a corporation is the money contributed by the corporators to the capital, and is usually represented by shares issued to subscribers to the stock on the initiation of the corporate enterprise."

And in 10 Cyc., at page 364: "The term 'capital stock' in an act of incorporation is said to mean the amount contributed or advanced by the shareholders as members of the company, and does not refer to the tangible property of the corporation."

But whatever obscurity or confusion may elsewhere exist as to the precise meaning and force of the term "capital stock," the averments of the declaration before us, ad-

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mitted to be true by the demurrer, put the matter beyond the range of controversy, for it is expressly charged that the whole of the capital stock was invested in and represented by the property and works necessary for the supply of water, and a tax upon the capital stock, in the sense in which it is used in the declaration, was undoubtedly a tax upon the property in which it was invested.

The first ground of demurrer is, therefore, overruled.

The second ground of demurrer is: "That the plaintiffs, not being parties to the contract between the defendant and Portsmouth and Suffolk Water Company, mentioned in the declaration, and not being the assignees of said contract, or any part thereof, but the assignees of, if anything, only a mere chose in action, to-wit, the additional rental alleged to be due by the defendant to the Portsmouth and Suffolk Water Company for the years 1901, 1902, 1903 and 1904, cannot maintain this action in their own names for the violation of any rights growing out of said contract."

It is not claimed in the declaration that the contract between the Portsmouth and Suffolk Water Company and the city of Portsmouth was ever assigned to the plaintiffs. The contention is that the plaintiffs are the assignees of a debt due to the Water Company, and that claim is a chose in action within the terms of section 2860 of the Code. In reference to this section, Barton, in the first volume of his Practice (end ed.), p. 236, says that "it now includes also open accounts in the use of the words 'or other chose in action,' upon which now suit may be brought in the name of the assignee, although formerly it could be only for his benefit. The language of the statute covers the right of the assignee or beneficial owner to assert in his own name the right to recover on any chose in action, whereas the former statute left every other instance except those specified in the language of the act to the rules as they were at common law."

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The third ground of demurrer is: "That the provision of the contract between the city of Portsmouth and the Portsmouth and Suffolk Water Company, mentioned in the declaration, that if at any time any city tax, levy or assessment for any public purpose shall be imposed upon any of the property or works of the company necessary for the supply of water, the rental agreed in said contract shall be increased to an amount equal to said city tax, assessment or levy, is in effect an exemption of the property or works of the said company necessary for the supply of water from city taxation, and did not pass to the Portsmouth, Suffolk and Berkley Water Company under the act of merger or consolidation of 1902."

If the premises were sound, the conclusion would follow; but is the contract stated in the declaration an exemption of the property and works of the company from taxation?

In *Grant* v. *City of Davenport,* 36 Ia. 396, the ordinance construed was assailed as violative of article 8, section 2, of the Constitution, which declares that the property of corporations shall be liable to taxation the same as the property of individuals. "If," said the court, "we placed the same construction upon the ordinance as the counsel for appellants seems to, we should probably concur with him in his legal positions and conclusions thereon. But it seems to us that when the whole ordinance is construed together, it does not amount to an exemption from taxation. It, in effect, applies the taxes, as they would otherwise become due, in part payment of, or in part consideration for, the water rent. The city pays the amount of money specified and the taxes upon the franchise and the property required for the management of the works as water rent. It might have required the payment of the taxes, and then returned the amount as part pay for water rent. The manner of doing it cannot defeat the power to do it."

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In *Monroe Water Works* v. *City of Monroe,* 110 Wis. 11, 85 N. W. 685, it is said: "An agreement for immunity from taxation will not be recognized, unless couched in terms too plain to be mistaken. Where, however, the agreement is express, and the intention evident, to exempt property and release it from tax burdens, it is void and will not be enforced. . . . The rule is equally well established that it is competent for a city and a company to agree that, as the price of services to be rendered, the city will pay a sum equal to the amount of municipal taxes to be levied."

In *Ludington Water Supply Co.* v. *City of Ludington,* 119 Mich. 488, 79 N. W. 561, it was contended that the provisions of the contract under consideration relating to taxes were invalid for the reason that the city had no power, under its charter, to exempt property from taxation, and that this contract was an attempt to exempt the property of the plaintiff in excess of a certain amount from its share of the public burden. The opinion says: "The contract does not purport to provide that the property of the plaintiff shall not be assessed. Its terms indicate that it was intended by both parties that it would be assessed, and that the plaintiff would pay the taxes on the property up to a certain amount, and the defendant all in excess, as a part of the consideration for the supply of water. The city no more exempts the property of the plaintiff from taxation by such an agreement than does the mortgager who agrees to pay the taxes levied against the mortgaged property exempt the mortgaged property from taxation. Possibly neither possesses the power to exempt property from taxation. Certainly neither has done it."

In *Cartersville, &c., Co.* v. *Mayor, &c., of Cartersville,* 89 Ga. 683, 16 S. E. 25, it was held, that "while a city cannot exempt a gas company from municipal taxation, it can contract to pay for gas a stipulated sum per lamp, and in

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addition thereto a sum for all the lamps supplied equivalent to the amount of taxes imposed upon the company, provided this additional sum is a fair and just allowance to compensate for the actual value of the light service, and the stipulation is *bona fide* and not in the nature of an evasion of the law prohibiting exemption from taxes. The present action is not brought to recover money voluntarily paid as taxes, but for a balance due under the contract for lighting the city, this balance being measured in part by the amount of taxes assessed and collected by the municipal government from the gas company." See also *Los Angeles* v. *Los Angeles City Water Works,* 49 Cal. 638.

We are of opinion that the third ground of demurrer is insufficient.

The fourth ground of demurrer is: "That the declaration does not allege facts sufficient to show that the payments of the taxes complained of were involuntary or were made under such circumstances as would entitle the Portsmouth and Suffolk Water Company, or its successors, or the plaintiffs, to recover the same."

This ground applies to the second count in the declaration and raises the question frequently presented as to whether or not a payment of taxes was voluntary or involuntary within the meaning of the law. If voluntary, they cannot be recovered back; if involuntary, the recovery may often be had.

It is contended by the plaintiffs in error that the payments here were involuntary, because the ordinance under which the tax was levied imposed a penalty of five *per cent.* if the tax was not paid when due. The claim of plaintiffs in error is that the imposition of a penalty is a species of duress, and that where the tax is paid to avoid this additional burden, it is altogether different from the payment of a tax and the claim that it was involuntary merely because the tax was illegal.

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The subject of the recovery back of illegal taxes paid under protest was fully considered by this court in the case of *Phoebus* v. *Manhattan Club,* 105 Va. 144, 52 S. E. 839, 8 Am. Cas. 667, and we shall content ourselves upon this point with referring to the opinion of Judge Buchanan in that case and the authorities there cited. We do not think that the imposition of a penalty differentiates the two cases—that they are in principle identical—and that the case cited controls that under consideration. To hold that the imposition of a penalty, which is designed to accelerate the prompt payment of taxes, constitutes a duress would be to render the payment of the great bulk of our taxes involuntary and subject to be recovered back, and subject the collection of taxes to all the inconveniences and ills pointed out by Judges Carr and Tucker in *Mayor of Richmond* v. *Judah,* 5 Leigh (32 Va.) 305.

What we have said sufficiently disposes of the fifth ground of demurrer; and upon the whole case we are of opinion that the court erred in sustaining the demurrer to the first count in the declaration, but properly sustained the demurrer to the second count ,and for the error in its ruling with respect to the first count its judgment must be reversed.

Reversed.

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Wytheville

RAFFERTY AND OTHERS v. HEATH AND OTHERS.

June 12, 1913.

1. RESCISSION—*False Representations—Material Facts—Truth.*—The false representation of a material fact, constituting an inducement to a contract for the purchase of real estate, on which the purchaser had the right to rely and upon which he did rely, is always ground for a rescission of the contract by a court of equity. The intent of the party making the representation, and his belief in its truth, are alike wholly immaterial. It is sufficient that the statement was material, was relied on by the purchaser, and was in fact untrue.
2. RESCISSION—*False Representations of Price Paid and Rents Received.*—False representations by a vendor of the price paid by him for the property, and of the amount of rents being actually received by him for it, when relied upon by the vendee, are sufficient to warrant a rescission of the contract of sale by a court of equity upon application therefor by the vendee.
3. RESCISSION—*Placing Parties in Statu Quo.*—In a suit to rescind a contract of sale of real estate, if a court of equity finds that a condition exists which renders it impossible to restore the parties substantially to their original positions, and that to rescind the contract would result in an injustice, the rescission will be refused.
4. RESCISSION—*Rights of Third Persons—Defendants' Objections.*—A defendant cannot defeat a rescission of a contract of sale of real estate procured by his fraudulent misrepresentations upon the plea that he has received and is in the enjoyment of the fruits of his fraudulent practices which he is unable or unwilling to restore. The court will protect the rights of innocent third persons which have intervened, and if this imposes an additional burden on the plaintiff, the defendant cannot complain of it.

Appeal from a decree of the Circuit Court of Mathews county. Decree for the complainant. Defendants appeal.

Affirmed.

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Moore, Barbour, Keith & McCandlish, Sleman & Lerch and *J. Boyd Sears,* for the appellants.

Henley, Garnett & Hall and *Sale, Mann & Tyler,* for the appellees.

KEITH, P., delivered the opinion of the court.

Heath was the owner of a farm in Mathews county containing about two hundred acres, with improvements upon it, lying upon the waters of North river, together with about 2,000 bushels of oysters planted in that river adjacent to the farm, all of which he valued at the sum of $60,000. He entered into negotiations, through the Southern Farm Agency, of Lynchburg, with Charles E. Rafferty for the exchange of his farm for property in the city of Washington, known as the Versailles Apartment House, which resulted in a contract dated September 19, 1910, by which Heath agreed to sell Rafferty his farm in Mathews county, with all the crops, tools, implements, furniture and other personal property thereon, for the sum of $60,000, and to take in payment the Versailles Apartment property in Washington on the basis of $200,000, subject to first and second liens amounting to $134,500, Rafferty agreeing to take the difference of $5,500 in preferred stock in the Versailles Apartment Corporation, and to pay cash $1,000 additional for preferred stock at par.

In addition to the first and second liens aggregating $134,500 there was a third lien upon the Washington property, amounting to about $13,000, which Rafferty undertook to satisfy.

On the 22nd of September, 1910, Heath and his wife made a deed conveying to Rafferty the property set out in the agreement of September 19. It seems to have been contemplated by the parties that Rafferty was to have made a deed of even date to Heath for the Versailles Apartment

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House, but there was some delay for reasons not necessary to mention, and the transaction was not consummated until some time in December.

By deed dated the 29th of November, 1910, and recorded on December 8 of that year, Rafferty and wife conveyed to the Versailles Corporation the Versailles Apartment House, subject to encumbrances of $134,500.

The negotiations between Heath and Rafferty finally culminated as follows: Heath conveyed all his Virginia property to Rafferty by an absolute deed, and Rafferty conveyed the Versailles Apartment House to the Versailles Corporation, which was authorized to issue $50,000 worth of preferred stock and $100,000 worth of common stock, Rafferty agreeing to take $5,500 of preferred stock and to buy $1,000 worth of that stock for cash at par; and it was this stock, preferred and common, that constituted the consideration received by Heath for his Mathews farm and personal property.

The deed from Heath to Rafferty is dated September 22, 1910. On the 28th of November, 1910, Rafferty conveyed the same property to a trustee to secure a loan of $16,000 made to him by the Gloucester-Mathews Bank. With this loan he satisfied the third lien resting upon the Versailles Apartment House, which in his negotiations with Heath he had undertaken to pay, and also paid the $1,000 in cash for the shares of preferred stock which he had agreed to purchase from Heath at its face value.

At the conclusion of the transaction, therefore, the title to all of Heath's Virginia property was in Rafferty, subject to the incumbrance which he had placed upon it to secure the Gloucester-Mathews Bank: the title to the Versailles Apartment House, subject to two liens amounting to $134,500, was in the Versailles Corporation and all of the stock of that corporation except preferred stock to the amount of $6,500, which was held by Rafferty, and a few

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shares of common stock held by different parties, was held by the appellee, Charles Heath.

Heath went into possession of the apartment house, but very soon became dissatisfied with his bargain, and on the 6th of February, 1911, he filed his bill setting out in detail the facts that we have already stated, and charging that he had been induced to part with his property as a result of a carefully concocted scheme to defraud him, and in reliance upon representations made to him by Rafferty which had proved to be wholly false; that Rafferty had assured him that his Washington city property had cost him $210,000, and was producing an annual net revenue of $10,000; and that in addition to these verbal assurances he had exhibited a statement, which is filed as an exhibit with the bill, from which it appears that the apartments were yielding a net revenue of more than $10,000.

We do not deem it necessary to go into a history of the organization and conduct of the Versailles Corporation, further than to say that its only asset was the Versailles Apartment House, upon which were three liens, amounting in the aggregate in round numbers to $148,000. The evidence proves beyond doubt, we think, that these representations were made and that in reliance upon them Heath was induced to enter into the contract which he now seeks to have rescinded; and that these representations were false and known to be false when they were made. The evidence shows that the value of the property was far less than Rafferty represented it to be—but let that pass as a matter of opinion only. It appears that it cost far less than he represented it to have cost, and upon the evidence it is doubtful if it could be sold for enough to satisfy the liens upon it; but the most material misrepresentation which he made was as to the rents which were actually being received upon it. Upon consideration of the whole evidence we cannot resist the conclusion that the

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whole transaction was the outcome of a carefully contrived plot to deceive and defraud the appellee.

It seems to be superfluous to cite authorities upon such a case, and we shall content ourselves with only a few.

In *Wilson, Trustee,* v. *Carpenter,* 91 Va. 183, 21 S. E. 243, 57 Am. St. Rep. 824, it is said: "The false representation of a material fact, constituting an inducement to a contract for the purchase of real estate, on which the purchaser had a right to rely, is always ground for a rescission of the contract by a court of equity. The intent of the party making the representation, and his belief in its truth, are alike wholly immaterial. It is sufficient that the statement is material, was relied on by the purchaser, and was in fact untrue."

In *Fitzgerald* v. *Frankel,* 109 Va. 603, 64 S. E. 941, a case which has a great many points in common with that under consideration, this court said: "If the purchaser of property has not equal means of information with the seller, and he has the right to rely upon representations made by the seller with reference to the proprty, evidence to show that he did not rely upon such representations must be of the clearest and most satisfactory character. In such cases there ought to be no room for inference or mere implication." See also *Cerriglio* v. *Pettit,* 113 Va. 533, 75 S. E. 303.

The appellee seems greatly to rely upon the inability of the court to place the parties in the same position which they occupied before the agreement was entered into which it is sought to rescind.

As the plaintiff comes into a court of equity asking relief, he can only obtain it, of course, upon equitable terms. If, therefore, in a particular case a court of equity finds that a condition exists which renders it impossible to restore the parties substantially to their original position, and that to rescind the contract would result in an injustice, the rescission will be refused.

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But we are of opinion that no such condition exists in this case. The appellee acted with the greatest promptness. The exchange of the property was not finally concluded until some time in December, 1910; it was promptly repudiated and a demand for rescission made almost immediately; and the bill in this case was filed on the 6th of February, 1911. The legal title to the apartment house was never in Heath, the appellee. As has been said, he took it subject to two liens by mortgage or deed of trust, and the legal title was therefore outstanding in the trustees or mortgagees. The equity was conveyed by Rafferty's deed of December 8, 1910, to the Versailles Corporation, and all that Heath ever received were the shares of stock, preferred and common, in the Versailles Corporation, and the rents of the apartment house for a short period, all of which he accounted for. The only material alteration in the condition of the parties was the result of the act of the appellant who placed a mortgage upon the Mathews property to secure the Gloucester-Mathews Bank. That incumbrance is a legal and binding lien which must be paid and the proceeds of which passed to and were enjoyed by Rafferty. It would be a strange result indeed if he could defeat the rescission of a contract procured by his fraudulent misrepresentation upon the plea that he had received and was in enjoyment of fruits of his fraudulent practices which he was unable or unwilling to restore.

The decree appealed from as far as possible in every particular preserves the rights of every party to the controversy, and is, therefore, affirmed.

Affirmed.

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Syllabus.

Wytheville

RECKER v. SOUTHERN RAILWAY COMPANY.

June 12, 1913.

Absent, Keith, P.

1. MASTER AND SERVANT—*Defective Appliances—Proximate Cause—Case at Bar.*—A plaintiff cannot recover on account of defective machinery or appliances, unless it affirmatively appears that the defect was the proximate cause of the injury complained of. In the case at bar, a hand torch was provided by the defendant for the use of the plaintiff in emergencies caused by the absence of the electric lights, and it is alleged that the injury was inflicted upon the plaintiff while using this torch, but there is no allegation that the torch was out of order, that it did not give sufficient light, that it was in any way inadequate for the purpose for which it was being used, or that the use of the torch caused the injury, and hence no case is stated against the defendant.

2. PLEADING—*Negligences—Contributory Negligence—When a Question of Law.*—Whether or not a declaration discloses such contributory negligence on the part of the plaintiff as will bar a recovery by him is, on a demurrer to the declaration, a question of law for the court. The demurrer admits the facts alleged to be true, and when the facts are undisputed and decisive of the case, a question of law is raised and the court should decide it.

3. MASTER AND SERVANT—*Contributory Negligences—Obvious Risk.*—To attempt to operate a dangerous machine driven by steam in the dark and without sufficient light is such an open and obvious risk that no prudent person would encounter the peril. When an employee is injured under such circumstances he cannot escape the result of his own contributory negligence upon the ground that he was acting under orders of the master when obedience to those orders involves exposure to danger so apparent that no prudent person would incur the risk.

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Error to a judgment of the Corporation Court of the city of Alexandria in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

S. G. Brent and *Howard W. Smith,* for the plaintiff in error.

Robert B. Tunstall and *Francis L. Smith,* for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This writ of error brings under review the action of the lower court in sustaining the defendant's demurrer to the plaintiff's original and amended declarations. The amended declaration contains all the averments of the original declaration and need only be looked to in disposing of the questions to be considered.

The action was brought to recover of the defendant railway company damages for personal injuries, and the case stated by the plaintiff in his declaration is that he was employed in the machine shops of the defendant company; that at the time of the injury complained of he was operating a boring mill, run with great force by steam, and was facing off a trailer box; that the work had been assigned him by a foreman of the defendant company, with directions to hasten its completion and not to put it aside until finished; that the defendant did not provide reasonably safe and suitable machinery and appliances for the use of the plaintiff, but negligently failed to do so, in this, to-wit: that on the morning of the accident at seven o'clock, the day being dark and foggy, the plaintiff went to work on the boring mill; that the electric lights, by which the

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shops were usually lighted were not burning; and that the light over the boring mill was out of repair, which the defendant knew or by the exercise of reasonable diligence could have known; that the absence of the light over the boring mill made it necessary for the plaintiff to use a hand torch provided by the defendant for use in emergencies caused by the absence of the electric lights; that the plaintiff held this torch in his right hand, while operating the boring mill with his left hand; that while thus operating the mill, it became necessary for him to lean over to observe the progress of the work, and that in holding the torch over the machine, so as to obtain sufficient light, and without any negligence or want of care on his part, his right hand was struck, caught, drawn and entangled in the boring mill, resulting in the injuries complained of.

The declaration does not allege that the boring mill was improperly constructed or in any way out of order. The thing complained of and the only negligence alleged is the defect in the light over the machine that made it necessary for the plaintiff to use the torch light provided for such emergencies. There is no allegation that the torch was out of order, that it did not give sufficient light, that it was in any way inadequate for the purpose for which it was being used, or that the use of the torch caused the accident. The averment is that while operating the mill it was necessary to lean over to observe the progress of the work, and that in holding the torch over the machine so as to secure sufficient light the plaintiff's hand was injured. These allegations can only mean that the defendant provided a hand torch to be used when the electric light was out, and that the plaintiff was using the hand torch so as to obtain sufficient light, and that thus used the hand torch furnished sufficient light, for the declaration does not suggest that while using it the plaintiff did not have adequate light. If the hand torch as used furnished

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enough light, it cannot be said that the absence of the electric light was the sole proximate cause of the injury or contributed in any degree thereto.

It is unnecessary to cite authorities to sustain the proposition that a plaintiff cannot recover on account of defective machinery or appliances, unless it affirmatively appears that the defect was the proximate cause of the accident of which he complains. *Williams* v. *Norton Coal Co.*, 108 Va. 608, 62 S. E. 342. If, however, the declaration were interpreted as alleging that the proximate cause of the accident was the absence of adequate light, then the demurrer was properly sustained, upon the ground that the plaintiff was guilty of such contributory negligence as to preclude his right to recover.

The contention is not tenable that the jury is the only tribunal in this case to pass upon the question of the plaintiff's contributory negligence. The demurrer admits the facts alleged to be true, and when the facts are undisputed and decisive of the case, a question of law is raised, and the court should decide it. *Wise Terminal Co.* v. *McCormick,* 104 Va. 400, 412, 51 S. E. 731.

In Beach on Contributory Negligence (2nd ed.), sec. 447, it is said: "When the facts are unchallenged and are such that reasonable minds could draw no other inference or conclusion from them than that the plaintiff was, or was not, at fault, then it is the province of the court to determine the question of contributory negligence as one of law."

It does not appear from the declaration when the plaintiff was directed to do the work he was doing at the time he was injured, nor is it suggested that he was ordered to do the work in an unlighted shop, or that on the morning of the accident his superior was aware of the fact that the light over the machine was not burning. The plaintiff went to the shop early in the morning of a dark, toggy day. He

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found the electric lights all out and the place in darkness. His work consisted in the management of a complicated machine driven by steam. With full knowledge of the conditions, and especially of the fact that the usual electric light over the machine was not burning, the plaintiff attempted to do the work, with the result that in some way, not explained in the declaration, his hand was caught and the injury complained of sustained.

To attempt to operate a dangerous machine in the dark or without sufficient light is such an open and obvious risk that no prudent person would encounter the peril. When an employee is injured under such circumstances, he cannot escape the result of his own contributory negligence upon the ground that he was acting on the orders of the master, when obedience to those orders involves exposure to such apparent danger that no prudent person would incur the risk. *Mason* v. *Post,* 105 Va. 494, 54 S. E. 311, 11 L. R. A. (N. S.), 1038. If the work was attempted without sufficient light, it is clear that the plaintiff was confronted by an open and obvious danger, which he could and should have avoided in justice to himself as well as to his employer. *Cranes Nest C. Co.* v. *Mace,* 105 Va. 624, 54 S. E. 479.

We are of opinion that if the facts stated in the declaration were proven as alleged the plaintiff would not be entitled to recover. The demurrer to the declaration was, therefore, properly sustained, and the judgment complained of must be affirmed.

Affirmed.

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Syllabus.

Wytheville

CITY OF RICHMOND v. BURTON.

June 12, 1913.

1. VERDICTS—*Evidence to Support.*—Although the facts of a case are controverted, the verdict of the jury will not be set aside, where there is evidence sufficient to sustain the verdict, and the jury have been properly instructed.
2. CONTRACTS—*Engineer's Estimates—Finality.*—Under a contract for the construction of a sewer providing that the city engineer shall decide all questions and disputes of every nature relative to the construction, prosecution and fulfilment of the contract, and as to the character, quality, amount and value of the work done and materials furnished, and that upon all such points his decision is to be final and conclusive on both parties, the parties are bound to abide by the decision of the engineer although it be erroneous, unless it be clearly proved by a preponderance of the evidence that such decision was fraudulently made, or that such a gross mistake was made thereby as necessarily to imply bad faith on his part, or a plain failure to exercise an honest judgment.
3. APPEAL AND ERROR—*Favorable Verdict—Adverse Instruction.*—A party in whose favor a verdict is found cannot assign as error the giving of an adverse instruction.
4. CONTRACTS—*Extra Work—Case at Bar.*—The contract in suit, like all other contracts, must be read as a whole so as to give effect to all of its parts. So reading said contract, the word "extra" used in section 23 requiring that the "amount of such extra costs and expense shall be ascertained before the commencement of the work" has no reference to work arising out of and entirely independent of the contract (something not required in its performance), but is the equivalent of *additional* work which was required in the performance of the contract—not necessary to the performance of the contract, in the sense that the contract could not be carried out without it, but necessary in the sense that by means of it the contract could be more conveniently and beneficially performed in the interest of both parties.

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5. CONTRACTS—*Case at Bar—Powers of Assistant Engineer.*—Looking to the entire contract in suit, it cannot be said as a matter of law that the assistant engineer had no power to authorize the excavation of a trench wider than that set out in the contract and the specifications and the original profile.

6. PLEADING—*Work and Labor—Motion Under Section 3211 of Code.*—A motion may be made under section 3211 of the Code to recover the price of work done and materials furnished in excavating for a sewer.

Error to a judgment of the Circuit Court of the city of Richmond in a proceeding by motion under section 3211 of the Code. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

INSTRUCTIONS ASKED FOR BY THE PLAINTIFF.

"The jury are instructed as follows:

"1st. As to the last three items of the claim of the plaintiff offered in evidence, they must find for the defendant, as the decision of the city engineer is final and conclusive as to them.

"2nd. As to the first three items of said claim, the city engineer or his assistant had power under the contracts to change the lines of the trench from time to time, and if they believe that the trench was dug by the plaintiff according to lines furnished by the assistant engineer, or by his subordinate under his direction, then the plaintiff was entitled to be paid according to the amount of excavation required by such lines. If they further believe that the first three items of the plaintiff's claim offered in evidence correctly represents the three amounts of excavation embraced in said claim and not paid for by the city, then they must find for the plaintiff as to those three items."

To the giving of the last of which instructions the attorney for the defendant objected, and moved the court to instruct the jury as follows:

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INSTRUCTIONS ASKED FOR BY DEFENDANT.

1. The court instructs the jury that Burton and Driscoll, assignors of the plaintiff, and the city of Richmond entered into binding and valid contracts whereby, in order to prevent all disputes and litigations, they appointed the city engineer of the city of Richmond sole arbitrator to decide all questions and disputes of every nature relative to the construction, prosecution and fulfillment of the said contracts, and as to the character, quality, amount and value of the work done and materials furnished under the said contracts, and further bound themselves that his decision on all such points was to be final and conclusive upon both parties to said contracts, and that they must abide by his decision although it be erroneous, unless it be clearly proved by a preponderance of the evidence that such decision was fraudulently made, or that such a gross mistake was made thereby as necessarily to imply bad faith on his part or a plain failure to exercise an honest judgment.

Therefore, inasmuch as the uncontradicted evidence in this case shows that the items of the claim of $4,648.28 asserted by the plaintiff in his bill of particulars filed with his notice were submitted to the city engineer in pursuance of the provisions contained in each of the said contracts shown in evidence, and further shows that the same were rejected by said engineer and payment thereof refused, the court tells the jury that they cannot in this case find a verdict in favor of the plaintiff for either of said items constituting said sum, unless they believe from the evidence that it is clearly shown by a preponderance of the same that the decision of the city engineer was fraudulently made or that such a gross mistake was made by him in rejecting said items as necessarily to imply bad faith on his part or a failure to exercise an honest judgment.

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2. The court tells the jury that the plans and specifications referred to in the contracts shown in evidence are a part of the same and are as binding as any stipulation or provision contained in said contract, unless such plans and specifications are in conflict with the contract, in which case the contract would prevail, but in this case the court tells the jury that there is no conflict between the plans and specifications and the said contract; it therefore became the duty of the contractors or their assignee, in digging the trench for the sewers, to conform with the said plans and specifications as fully and completely as if the same were incorporated into the body of the contract, and the court further tells the jury that no one of the assistants of the city engineer or inspectors upon the work had any right to make any change or departure from the plans and specifications, and therefore, even though the jury believe from the evidence that one of the assistant engineers, or inspectors, may have laid off the line of the ditch to be dug, and increased the dimensions thereof, which caused the cutting of the trench for the sewers of larger dimensions than those prescribed in the plans and specifications, yet such act on their part did not bind the defendant, the city of Richmond, and as a consequence the plaintiff is not entitled to recover in this action for the excess of excavation outside of that called for by the specifications, and they, the jury, should so find in their verdict.

3. The court tells the jury that according to the true meaning and construction of the contracts shown in evidence, neither the city engineer, nor his assistant, had any right or power, under said contracts, to change the lines or widths shown on the plans for the sewer trenches to be dug by the contractors, and even though they believe from the evidence that the assistant engineer did lay off or permit to be laid off, the trenches of a greater width than that provided for in the plans, yet the plaintiff is not

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entitled to recover in this case any sum for excavation outside the lines and widths provided for in the said plans, there being no evidence to show that the amount of the extra cost and expense to which the contractor would be entitled by reason of the widening of the said trenches, was ascertained before the commencement of the part of the work where such widening took place.

To the giving of which instructions so offered for the defendant the attorney for the plaintiff objected, and thereupon the plaintiff by counsel withdrew said second instruction offered by him and moved the court, in lieu of said second instruction so offered by him, to instruct the jury as follows:

"While it is true that under the contract the decision of the city engineer is presumed to be correct and is final and binding, unless fraudulent or based upon a gross or palpable error, yet, if you believe that his decision was based not upon his personal knowledge, but only upon the statements or information furnished by his subordinates, that the trench in its width was not dug by lines furnished by his subordinates but at a width determined by the contractor, and further believe from the greater weight of the evidence that the trench was dug by lines furnished by Van Doren under orders of the assistant city engineer, and that the assistant city engineer deemed it necessary for the city's interest to order such lines, then you must hold that the decision of the city engineer was based upon an error which palpably destroyed the right of the plaintiff to receive payment for the full amount of excavation done. And if you further believe that the first three items of the plaintiff's claim offered in evidence correctly represents the three amounts of excavation done within said lines and not paid for by the city, then you must find for the plaintiff as to those three items."

And thereupon the court gave instruction No. 1 offered

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by the plaintiff, instruction No. 1 offered by the defendant, and, in addition, on its own motion, gave an instruction in the words and figures following:

COURT'S INSTRUCTION. 3.

"The court further instructs the jury that if they shall believe from the evidence that it is clearly shown by a preponderance of the evidence that the decision of the city engineer was fraudulently made, or based upon false or fraudulent information, or that such a gross mistake was made by him in rejecting said items as necessarily to imply bad faith on his part or a failure to exercise an honest judgment, and if they further believe from the evidence that it was found necessary in the excavation to increase the dimensions greater than shown upon the plans, and that the line of the trench was widened by the city engineer or his assistant, and that as so widened the plaintiff's assignors dug the trench as directed, then they should find for the plaintiff for such extra amount of excavation as you may believe from the evidence was dug and assess his damages at the same rate per cubic yard as given in the original proposal."

To which action of the court, in refusing to give instruction 2 and 3 offered by the defendant, and in giving instruction No. 3 of its own motion, the defendant, by counsel, objected, but the court overruled said objection, to which action of the court in so refusing to give instructions Nos. 2 and 3 respectively offered by the defendant and in giving said instruction No. 3 the defendant, by counsel, excepted.

H. R. Pollard, for the plaintiff in error.

Meredith & Cocke, for the defendant in error.

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KEITH, P., delivered the opinion of the court.

Burton brought suit against the city of Richmond to recover a balance alleged to be due for the excavation of a sewer, and recovered a judgment, which is now before us upon the petition of the city of Richmond to review certain rulings made during the trial of the case.

There appears to be no dispute as to the amount of excavation done, or the price charged. The payment of the demand was resisted by the city upon the ground that the additional work for which the claim is made was never authorized by the city or its agents, and that the officers of the city under whose supervision the work is alleged to have been done had no authority to make any change in or departure from the plans and specifications set out in the contract between the city and Burton.

In the early stages of the work the contractor seems to have conformed substantially to the plans and specifications set out in the contract, and to the profile furnished him by the city engineer, but as the work progressed it was found that material was of such a nature that the sides of the trench would give way and slough off into the ditch, and that to prevent this it was necessary to put in ribs of timber and fill in the place where the sloughing had taken place with bricks, and for the material and work thus made necessary the city made payment without objection. In consequence of this condition of things Burton approached the assistant city engineer in charge of the work for the city, and called his attention to the trouble and expressed the opinion that if the trench were made wider and the weight taken off the sides by giving the banks a slope instead of having them perpendicular, it would be to the advantage of all parties concerned. The assistant city engineer acquiesced in this suggestion, and in consequence thereof the lines of the ditch were staked off much wider

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than the original plans, specifications and profile called for, and the inspector under whose supervision the stakes were set kept a measurement of the additional excavation thus rendered necessary.

These are the facts which the evidence tends to prove on behalf of the defendant in error. They are controverted by the plaintiff in error, but must be accepted by us, the verdict of the jury having found them to be true.

The view of the plaintiff in error is that the change was made and the additional work done as a matter of convenience to the contractors, as they were thereby enabled to use machinery to a greater advantage in the excavation of the trench; but there is evidence tending to show that by the method adopted the city was saved a considerable sum of money as the ribbing with timber was no longer necessary and the use of so many brick was not required.

After the evidence was introduced to the jury the court gave certain instructions. The first to which we shall call attention was asked for by the defendant, and is predicated upon that provision in the contract which declares that the city engineer shall decide all questions and disputes of every nature relative to the construction, prosecution and fulfillment of the contracts, and as to the character, quality, amount and value of the work done and materials furnished, and that his decision upon all such points was to be final and conclusive upon both parties, and they must abide by his decision, although it be erroneous, unless it be clearly proved by a preponderance of the evidence that such decision was fraudulently made or that such a gross mistake was made thereby as necessarily to imply bad faith on his part, or a plain failure to exercise an honest judgment.

To the giving of this instruction the plaintiff excepted, but we are of opinion that it correctly states the law as it prevails in this court and in other jurisdictions, and could

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not be the subject of an assignment of error in any event as the judgment of the circuit court was for the plaintiff, and we, therefore, mention the instruction merely as tending to show that the case was properly submitted to the jury.

The city of Richmond offered two instructions which were refused, in which the court was asked to construe the contract between Burton and the city, and tell the jury that no one of the assistants of the city engineer, or inspectors, upon the work had any right to make any change or departure from the plans and specifications set out in the contract, even though the jury believed from the evidence that one of the assistant engineers or inspectors laid off the line of the ditch to be dug, and increased the dimensions thereof, which caused the cutting of the trench for the sewers of larger dimensions than those prescribed in the plans and specifications, yet such act on their part did not bind the defendant, the city of Richmond, and as a consequence the plaintiff is not entitled to recover in this action for the excess of excavation outside of that called for by the specifications.

The court also gave an instruction of its own motion, the first branch of which pertains to the duty of the city engineer under the contract to settle all questions of dispute as to the character, quality, amount and value of the work to be done and material furnished, and which declares his decision on all such points to be final and conclusive. It is conceded to be substantially a reiteration of the instruction upon the same subject already referred to as having been given at the instance of the plaintiff in error, and need not be further noticed. The second branch of the court's instruction is the converse of the principle announced in the instructions asked for by the city and refused by the court, and tells the jury that if it was found necessary in the excavation to increase the dimen-

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sions greater than those shown upon the plans, and that the line of the trench was widened by the city engineer or his assistant, and that as so widened the plaintiff dug the trench as directed, then they should find for the plaintiff for such extra amount of excavation as they believed from the evidence was dug, and assess his damages at the same rate per cubic yard as was agreed upon in the proposal; the contention of the city being that the contract between the city and Burton constitutes the law of the case; that there could be no departure from it except as authorized by the contract itself; and that in all cases where a claim is made under a contract for extra work, it is incumbent upon the contractor to show that the amount of extra expense had been ascertained and the price and cost thereof agreed upon in writing between the city engineer and the contractor before the commencement of the work, while upon the part of the contractor the contention is that reading the contract as a whole the officers of the city in charge of the work were authorized to deviate from the plans and specifications set out in the contract, and that for the additional work authorized by the assistant engineer the city was responsible. Upon the decision of this question the determination of this controversy must depend.

We do not think that it can be successfully contended that the work here sued for was not done with the knowledge and approbation of the assistant engineer for the city. The evidence is full and complete that the attention of the city engineer was called to the trouble, the remedy suggested by the contractor and approved by the assistant engineer, and that as a consequence stakes were set which departed from the original profile furnished by the engineer's department to the contractors, and that the excavation was made in accordance with the new arrangement; that an account of the work so done was kept by the city's

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inspectors by direction of the assistant city engineer; and that as to the amount of work so done and the prices charged there is no dispute.

As to the contention of the city that the change was made to meet the interest and convenience of the contractors, there is evidence strongly tending to show that the city was benefited as well as the contractors, and that by the change a sum of money amounting to four or five thousand dollars was saved to the plaintiff in error.

The contract between the city and the contractor is to be considered as a whole so as to give effect to all of its parts. This rule of construction is elementary, is not questioned and needs no citation of authorities in its support.

The second clause of the specifications provides that "The size and form of the sewer, its location and grade, the catch basins, stacks, manholes, or any other connections must conform with the plans on file in the office of the city engineer, subject to such modifications, additions or omissions as the city engineer may deem necessary during the execution of the work." And just here it may be well to observe that it is conceded that within the line of his duty the powers of the city engineer and his assistant are identical.

In clause 4 of the specifications it was provided: "Trenches to be dug in accordance with the lines, grades, depths and widths which will be given by the city engineer or his assistant from time to time. . . . Should it be found necessary in the excavation to increase the dimensions and depths greater than shown on the plans, there shall be no extra charge for such changes, but the contractor will be paid at the same rate per cubic yard as given in the original proposal."

In section 21 of the specifications it is provided that "All directions, etc., necessary to complete any of the provisions

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of these, etc., specifications and give them due effect will be given by the city engineer or his assistants in charge, whenever requested by the contractor. All lines and grades will be given by the city engineer or his assistant, and the contractor will be required to protect such stakes or marks and conform his work accurately thereto."

And in section 22: "The city engineer or his assistant and inspectors shall have access at all times to any and all parts of any work being done, for the purpose of inspection, measurement and establishment of lines and grades."

In answer to all this the city contends that the authority of the city engineer and his assistants are limited and controlled by the 23rd section of the specifications, which is as follows: "Before commencing any part of the work herein specified and described, the city engineer is authorized to make such changes in the lines and grades and dimensions which may not entail any extra expense to the contractor. And in the prosecution of the work, should there be any change in the lines, grades or dimensions of the work to be done under the contract, which may entail cost to the contractor, it is understood and agreed that the amount of such extra cost and expense, the contractor shall be subjected to, shall be ascertained before the commencement of the work, and this agreement as to the amount to be paid shall be final."

We are satisfied that this section is not susceptible of the construction claimed for it by the plaintiff in error. The word "extra" as here used has no reference to "work arising out of and entirely independent of the contract, something not required in its performance," but is the equivalent, we think, of *additional* work which was required in the performance of the contract—not necessary to the performance of the contract, in the sense that the contract could not have been carried out without it, but

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necessary in the sense that by means of it the contract could be more conveniently and beneficially performed in the interest of both parties to it.

That the work here sued for was not of the character contemplated in the 23rd section further appears from the fact that there was no occasion to agree upon the price of the work, for that had already been agreed upon as so much per yard, and the compensation demanded here is the price per yard of excavation as stated in the contract. That such is the definition to be given to the term "extra" as employed in the 23rd section will more plainly appear by reference to the concluding portion of clause 4 of the specifications already quoted, as follows: "Should it be found necessary, in the excavation, to increase the dimensions and depths greater than shown on the plans, there shall be no extra charge for such changes, but the contractor will be paid at the same rate per cubic yard as given in the original proposal."

We cannot say, as a matter of law, looking to the entire contract, that the assistant engineer had no power to authorize the excavation of a trench wider than that set out in the contract and the specifications and the original profile, and we, therefore, are of opinion that the circuit court did not err in refusing to give the instruction asked for by the plaintiff in error.

It is proper for us to state that there is no suggestion in this record that there was any fraudulent act or intent upon the part of any of the agents or officers of the city, and we entertain no doubt that the city engineer acted throughout with no other purpose or motive than to render exact justice to all concerned; but we are further of opinion that the jury having been properly instructed, and the evidence being sufficient to sustain their verdict, there is no error in the judgment of the circuit court upon the question thus far considered.

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The point is made in the petition for the writ of error that a motion for judgment was not the proper remedy in this case; that such demand, if due at all, was for damages resulting from the breach of the contract in the notice mentioned, and was recoverable only in an action sounding in damages, and is not money which the plaintiff is entitled to recover by action on any contract.

Granting that as the law stood at the time this suit was brought the proposition as stated in the petition is sound, this case does not come within its terms, and the case of *Wilson* v. *Dawson,* 96 Va. 687, 32 S. E. 461, so far from sustaining the contention of plaintiff in error, is decisive to the contrary. It is true that it was held in that case that "damages for an injury resulting from a breach of contract, recoverable only in an action 'sounding in damages,' can in no sense be considered money due upon contract, and hence a motion under section 3211 of the Code, as it stood when this motion was made in any case where a person was 'entitled to recover money by action on any contract' cannot be maintained to recover damages for a breach of contract, or the profits which the plaintiff would have made if he had been permitted to fulfill his contract." In that case the plaintiff filed a bill of particulars which consisted originally of thirty-one items, all of which except one to seven, inclusive, and twenty-seven and twenty-eight were abandoned. Items one to seven, inclusive, it seems, were for masonry, excavation and concrete work done, and stone quarried and delivered, while twenty-seven and twenty-eight were for profits claimed by Mrs. Dawson upon concrete and masonry work which she would have made had she been permitted to complete her contract. The claims in that bill of particulars illustrate what could be done and what could not be done under the law as it then stood. The case before us is plainly of like nature with the claims in that case for masonry,

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excavation, concrete work done and stone quarried, for which a recovery was permitted, while items twenty-seven and twenty-eight were for causes of action strictly "sounding in damages" for which a recovery was not allowed. As said in the opinion in the case cited: "The utmost that the plaintiff had a right to recover in this mode of proceeding is the amount of the first seven items of the account filed with the notice, and therefore the verdict and judgment, including damages for the breach of the contract, embraced in items 27 and 28 of the account, is, we think, clearly erroneous, and should be reversed and annulled."

Upon the whole case, we are of opinion that there is no error in the judgment before us, which is affirmed.

Affirmed.

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Wytheville

ROSENBERG v. THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND.

June 12, 1913.

Absent, Keith, P.

1. PROCESS—*General Appearance—Motion to Dismiss for Want of Declaration.*—Where the court has jurisdiction of the subject matter of an action, an appearance and motion to dismiss the action for want of a declaration is a general appearance, though designated special, and is a waiver of all defects in the process and the time and manner of its service. The defendant thereby submits himself to the jurisdiction of the court.

Error to a judgment of the Circuit Court of the city of Norfolk in an action of assumpsit. Judgment for the defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

Jeffries, Wolcott, Wolcott & Lankford, for the plaintiff in error.

Baird, Swink & Moreland, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This is an action of assumpsit brought by the plaintiff in error, Max Rosenberg, hereinafter called the plaintiff, against the defendant in error, The United States Fidelity and Guaranty Company, hereinafter termed the defendant.

The object of the action is to recover damages for the

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alleged breach of a contract of guaranty whereby the defendant undertook and promised to make good and reimburse the plaintiff (to the extent of $1,000) for all pecuniary loss sustained by him for moneys, etc., in the possession of one B. S. Johnson, as manager for the plaintiff, for which he was responsible, by acts of dishonesty amounting to the larceny or embezzlement of such moneys, etc.

On motion of the defendant the court dismissed the action, being of opinion "that the plaintiff has proceeded in the wrong forum"; and to that order this writ of error was granted.

There is no question but that the case stated in the declaration is one within the general jurisdiction of the circuit court of the city of Norfolk, but the contention of the defendant is that upon the facts the court has no jurisdiction of the particular case—because the defendant is a Maryland corporation, and it does not appear that the cause of action or any part thereof arose in the city of Norfolk, and, therefore, the process could not lawfully be sent to the city of Richmond and served on the statutory agent of the defendant, as was done in the instant case. *Deatrick* v. *State Life Insurance Co.*, 107 Va. 602, 59 S. E. 489.

If, however (as we apprehend the situation to be), the record shows an appearance to the action, or a general appearance, on the part of the defendant, it is unnecessary to consider any of the questions raised with respect to the direction and service of process. Because it is a well settled rule of practice that by such appearance the defendant waives all defects in the manner and service of process and submits himself to the jurisdiction of the court. The defendant appeared and moved the court to dismiss the action for want of a declaration, and the court having jurisdiction of the subject-matter, subsequent ob-

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jection to the jurisdiction on the ground of irregularities affecting the process merely must be treated as having been waived.

In *Frank* v. *Zeigler,* 46 W. Va. 614, at page 618, 33 S. E. 761, at page 762, the court says: "The object of service of process is only to notify persons of the suit and bring them under the power of the court. Appearance answers the same purpose. By it the party submits himself to the jurisdiction of the court. Any appearance, except to object to the jurisdiction—as, for instance, to take advantage of defect in process or return—is a general appearance, not special, and will dispense with its service. Any motion in the case will do so."

Here the motion of the defendant was in no sense founded on lack of jurisdiction of the court, or of defective process or return. On the contrary, it distinctly recognized the jurisdiction of the court and invoked the exercise of that jurisdiction to dismiss the action because of non-compliance on the part of the plaintiff with the statute in the matter of filing the declaration. This was obviously a general and not a special appearance, though designated as such, and by it the defendant submitted itself to the jurisdiction of the court.

In *New River Mineral Co.* v. *Painter,* 100 Va. 507, 42 S. E. 300, the court held that, "appearing to an action, even for the purpose of taking or accepting a continuance, is a waiver of all defects in the service of the writ." *Lane Bros. & Co.* v. *Bauserman,* 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872; *Norfolk & W. Ry. Co.* v. *Sutherland,* 105 Va. 545, 54 S. E. 465.

In *Norfolk & O. V. Ry. Co.* v. *Turnpike Co.,* 111 Va. 131, 68 S. E. 346, Am. Cas. 1912a, 239, the rule is stated thus: "An appearance for any other purpose than questioning the jurisdiction of the court because there was no service of process, or the process was defective, or the service

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thereof was defective, or the action was commenced in the wrong county, or the like, is general and not special, although accompanied by the claim that the appearance is only special. A motion to vacate proceedings in a cause, or to dismiss or discontinue it, because the plaintiff's pleading does not state a cause of action, is equivalent or analagous to a demurrer, and amounts to a general appearance."

The rule is similarly stated in the valuable newly published work, Burks' Pleading and Practice, 326.

Upon these authorities, it is plain that the court acquired jurisdiction of the defendant, and, having general jurisdiction of that class of cases, should have overruled the motion to dismiss the action, and proceeded with the trial on the merits.

For these reasons the judgment must be reversed and the case remanded for further proceedings in conformity with the views expressed in this opinion.

Reversed.

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Wytheville

ST. STEPHEN'S EPISCOPAL CHURCH AND OTHERS v. MORRIS' ADMINISTRATOR AND OTHERS.

June 12, 1913.

Absent, Keith, P.

1. WILLS—*Devise to Church—Legal Beneficiary—Enforcement in Equity.*—While a church cannot take real estate by devise, under the statute law of this State, if property be devised to a church for a specific, definite, legal purpose, such as the erection of a memorial to a deceased relative, the church is not the beneficiary but a bare trustee, holding the property for the object named, and the devise is valid, and if for any reason the church cannot administer the trust through the medium of its agencies, a court of equity will administer it, on the principle that a court of equity will never permit a trust to fail for want of a trustee.

2. WILLS—*Devise to Church and Others—Personality for Benefit of Church—Case in Judgment.*—When an estate, consisting of real and personal property, but chiefly personal estate, is devised and bequeathed to a church with directions to apply one half of the estate to the erection of a designated memorial, and $600 of the residue to the purchase and erection of certain specified tombstones, inasmuch as a church cannot take real estate by devise under the laws of this State, a court of equity, in furtherance of the purposes of the testator, will discharge the interest of the church under the will, from that portion of the estate which it can take without objection, and devote the real estate or its proceeds to building the memorial and buying the tombstones, which is not an illegel intent and violates no law. It is not the policy of the law to seek grounds for avoiding devises and bequests, but rather to deal with both so as to uphold and enforce them if it can be done consistently with the rules of the law.

Appeal from a decree of the Circuit Court of Culpeper county. Decree for the complainants. Defendants appeal.

Reversed.

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The bill in this cause was filed by the heirs of the testator against St. Stephen's Episcopal Church, and the rector, vestry and trustees of that church, and seeks to have the will of the testator declared null and void in so far as it attempts to pass the real estate of which the testator died seized and possessed to the Episcopal Church (St. Stephen's) of Culpeper.

Moore, Barbour, Keith & McCandlish and *Hiden & Thurlow,* for the appellants.

Waite & Perry, R. A. Bickers, and *Grimsley & Miller,* for the appellees.

HARRISON, J., delivered the opinion of the court.

W. C. Norris, of Culpeper county, died unmarried and without issue on the 11th day of May, 1909, leaving a will dated June 30, 1896. This will disposes of the testator's real and personal estate as follows:

"I have $22.42 on my person and $315.50 in bank. If I die, I leave everything, real and personal, to the Episcopal Church (St. Stephen's) of Culpeper, they to allow me sepulcher in churchyard, and also my sister, who is to be brought from Catonsville, Md.; $600.00 is to be devoted to buying six tombstones for my mother, father and self and sister and two aunts, an account of whose birth, death, &c., will be found in my Bible, which has my name on the back in guilt letters. I desire half of my property to be devoted to putting a brick or iron fence around the churchyard, with an inscription stating it to be in memory of my sister, Annie E. Norris."

Between the date of this will and the date of the testator's death he had converted the most valuable portion of his real estate into personal property, so that at the time

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of his death very much less than half of his estate remained in the form of realty.

The heirs at law of the deceased attack the validity of that portion of the will which disposes of the real estate, upon the ground that the church cannot take and hold real estate by devise, being prohibited from so doing by the provisions of section 1398 of the Code of 1904.

It is not denied that under the statute invoked the church cannot take and hold a devise to it of real estate. The testator does not, however, as contended, leave his entire estate as a gift to the church. It is true that in the beginning of his will the testator says, "I leave everything real and personal to St. Stephen's Episcopal Church," but when the will is read as a whole, and the intention of the testator is ascertained from the language used, it is plain that he did not leave the whole estate as a gift to the church, for in clear and unequivocal terms he dedicates one-half of his estate to be used for the erection of a fence around the churchyard, which is to have an inscription thereon showing that it is a memorial to his deceased sister, and further appropriates $600.00 of his estate for the purchase of tombstones for himself and certain other members of his family. There can be no question that the testator could lawfully dedicate the whole or any part of his estate, even though it consisted entirely of realty, to the erection of this memorial and the purchase of the tombstones mentioned. As to that portion of the estate dedicated to these purposes, the church is not the beneficiary, but a bare trustee, holding the same for the objects named, and if for any reason the church through its agents could not administer the trust, the court would administer it and accomplish the purposes of the testator, it being well settled that a court of equity will not permit a trust to fail for the want of a trustee.

The will is not expressed in an artificial manner. Its

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plain meaning, however, is that the testator gives one-half of his estate to the erection of the fence as a memorial to his deceased sister, $600 thereof for the purchase of tombstones for himself and other members of his family, and the residue of the estate is given to the church. The disposition made of the estate necessarily involves an equitable conversion of the real estate left into money, otherwise the purposes of the testator could not be effectuated; but, if this were not so, there would be no violation, in this case, of the statute inhibiting a church from taking a devise of real estate. Much the greater portion of the estate left was personal property, and a court of equity, in furtherance of the purposes of the testator, would discharge the interest of the church, under the will, from that portion of the estate which it could take without objection, and devote the real estate, or its proceeds, to building the memorial and buying the tombstones, which was not an illegal intent and violated no law.

Every sane man must be allowed to make his own will, provided he violates no law or public policy in disposing of his estate. It is not the policy of the law to seek grounds for avoiding devises and bequests, but rather to deal with both so as to uphold and enforce them if it can be done consistently with the rules of law.

As Lord Hardwick said: "The bequest is not void and there is no authority to construe it to be void, if by law it can possibly be made good." Perry on Trusts, sec. 709.

It is plain that the manifest purpose of this testator, in the case at bar, can be carried out and his estate appropriated as he directed without violating in any respect the provisions of the statute inhibiting a church from taking real estate by devise. We are, therefore, of opinion that the circuit court erred in so construing the will under consideration as to give the real estate passing thereunder to

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the heirs at law of the testator, thereby diminishing, to that extent, the fund dedicated by the testator to the erection of a memorial to his deceased sister.

The decree appealed from must be reversed and the cause remanded for further proceedings therein not in conflict with the views expressed in this opinion.

Reversed.

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Wytheville

SMITH'S ADMINISTRATOR v. HATKE.

June 12, 1913.

1. LIFE INSURANCE — *Eleemosynary Associations — Beneficiaries — Interest of Subscriber.*—A certificate of membership in a wholly voluntary incorporated association, organized entirely for eleemosynary purposes, providing that the fund contributed upon the death of a subscriber shall be paid to such beneficiary as he may designate, with the right to change the beneficiary at pleasure, upon notice, and containing no provision, under any contingency, for payment of the fund voluntarily donated, in whole or in part, to the subscriber while living, or to his estate after his death, is not an ordinary life insurance policy. Under such a certificate, neither the estate of the subscriber nor his next of kin has any interest whatsoever in the fund where he fails to designate a beneficiary, or where the beneficiary designated dies before the subscriber, or has no insurable interest in his life, or for any other reason is not entitled to the fund. In all such cases the donation reverts to the association. Neither the subscriber in his lifetime, nor his personal representative after his death, has any property rights in the policy. He has only the power to appoint a beneficiary.

Error to a judgment of the Circuit Court of the city of Richmond in an action of assumpsit. Judgment for the defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Edward L. Ryan and *O'Flaherty & Fulton,* for the plaintiff in error.

Sands & Swartwout and *Leon M. Bazile,* for the defendant in error.

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WHITTLE, J., delivered the opinion of the court.

The plaintiff in error, as administrator *de bonis non* of Thomas Smith, Jr., deceased, brought this action of assumpsit against the defendant in error, Louis B. Hatke, to recover $1,297.80, which sum was paid to the defendant in the following circumstances: On November 25, 1907, Thomas Smith, Jr., who was a subscriber to an association entitled the "Voluntary Subscription Fund of Pullman Conductors and Office Men," in accordance with the contract, rules and regulations of the association, designated the defendant as his beneficiary in case of his death. Smith died March 6, 1909, and thereupon the association paid the fund to the defendant.

Upon the trial of the case, the defendant demurred to the plaintiff's evidence, and to the action of the circuit court sustaining the demurrer and rendering judgment thereon for the defendant in error, Hatke, this writ of error was granted.

The following is the form of the contract out of which the transaction arose:

"Whereas, it has been deemed advisable that a Mutual and Voluntary Agreement be entered into by the subscribers of these presents and all other like subscribers, that an association be formed, to be entitled 'Voluntary Subscription Fund of Pullman Conductors and Office Men';

"Therefore, be it agreed, That, in the event of the death from any cause whatsoever of a subscriber to this fund, each and every other subscriber shall give and donate the sum of one dollar. The total amount of such subscription to be paid to such beneficiary as may be designated by said subscriber; it being understood that subscriber can at any time change the name of beneficiary upon due notice to District Agent. It is further agreed, That, if any subscriber default in any single call for subscription, that his

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name be stricken from the list of subscribers, and that he shall forfeit any claims for benefits under the terms of this agreement."

Rule 6. "All subscriptions must be paid within thirty days after notice of death is received, and when subscriptions are completed in each district a personal check or draft will be made out in the name of the beneficiary and sent to General Agent, who will forward same to home station of deceased."

The association is not a party to this litigation, and the plaintiff in error asserts no demand against it.

The entire fabric of plaintiff's case rests upon the propositions: (1) That the contract between the association and his intestate is to be regarded as an ordinary life insurance policy upon the life of the latter, which, upon his death, constituted an asset of his estate; and (2) that the title of the estate to the fund was not affected by Smith's designation of Hatke as his beneficiary, since, it is said, Hatke had no insurable interest in Smith's life, either as creditor or in any other capacity. Therefore, that his designation as a beneficiary was a mere wager contract on the life of Smith and was void as contrary to public policy. Unless the first proposition can be maintained, there will be no occasion to concern ourselves about the second. In other words, unless the fund is an asset of Smith's estate, the action cannot be maintained by his administrator for its recovery, whatever may be the infirmities in Hatke's title.

The case of the *Cosmopolitan Life Insurance Company* v. *Koegel,* 104 Va. 619, 52 S. E. 166, is relied on for the contention that this is an ordinary life insurance policy, and that upon the death of the insured title to the fund, by operation of law, devolved upon his personal representative. An examination of the record in that case shows that the "Royal Tribe of Joseph" (in which order Koegel held a benefit certificate, or policy of insurance, on his life

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for $2,000 for the benefit of his wife) was an incorporated organization by the laws of the State of Missouri, under the supervision of the insurance department, with a written constitution, general laws, by-laws and rules for its government. It had a full corps of trustees, bonded officers, medical examiners, and such other agents as are usually found on the rolls of other mutual life insurance companies; and also prescribed a membership age limit, with graduated scale of premium rates, payable periodically. In short, it was a regularly equipped mutual benefit insurance company, with supreme, grand and subordinate lodges, and was carrying on that sort of life insurance business throughout the United tSates. The authorities are generally agreed in classifying such organizations as mutual life insurance companies.

On the other hand, the association in the instant case is unincorporated, and, as its name imports, is a mere "Voluntary Subscription Fund of Pullman Conductors and Office Men," organized wholly for eleemosynary purposes, and containing no provision, under any contingency, for payment of the fund voluntarily donated, in whole or in part, to the subscriber while living or to his estate after death. On the contrary, the contract expressly stipulates, in language too plain to be misunderstood, that the total amount of the subscription is to be paid to such beneficiary as may be designated by the subscriber; and, moreover, that the subscriber can at any time change the name of the beneficiary upon notice to the district agent.

It has been repeatedly held, by courts of high authority, that under similar certificates neither the estate of the subscriber nor his next of kin has any interest whatsoever in the fund where he fails to designate a beneficiary, or where the beneficiary designated predeceases the subscriber, or has no insurable interest in his life, or for any other reason, is not entitled to the fund. In all such cases the donation reverts to the association.

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In *Leftwich* v. *Wells,* 101 Va. 255, 43 S. E. 364, 99 Am. St. Rep. 865, this court held that under a similar policy the subscriber had no property rights therein, but only the power to appoint a beneficiary. To the same effect are the following decisions from other States: *Hellenberg* v. *Dist. No. One of I. O. of B. B.,* 94 N. Y. 580; *Taylor* v. *Hair,* 112 Fed. 913; *Warner* v. *Modern Woodmen of America,* 67 Neb. 233, 93 N. W. 397, 61 L. R. A. 603, 108 Am. St. Rep. 634, 2 Ann. Cas. 660; *Cook* v. *Improved Order Heptasophs,* 202 Mass. 85, 88 N. E. 584; *Swift* v. *S. F. S. & E. Board,* 67 Cal. 567, 8 Pac. 94. Other authorities to the same point could be cited, but those given sufficiently sustain and illustrate the principle involved.

As corollary to the proposition that decedent's estate has no property rights in the fund, it follows that his personal representative cannot question Hatke's title thereto. *Maguire* v. *Maguire,* 59 N. Y. App. 143, 69 N. Y. Supp. 61; *Munhall* v. *Daly,* 37 Ill. App. 628; *Johnson* v. *Van Epps,* 110 Ill. 551; *Meyers* v. *Schumann,* 54 N. J. Eq. 414, 34 Atl. 1066; *Stoelker* v. *Thornton,* 88 Ala. 241, 6 South 680, 6 L. R. A. 140.

Upon these considerations we find no error in the judgment of the circuit court, and it is affirmed.

Affirmed.

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Syllabus.

Wytheville

SOUTHERN RAILWAY COMPANY v. RICE'S ADMINISTRATRIX.

June 12. 1913.

1. MASTER AND SERVANT—*Death of Servant—Violating Speed Ordinance—Negligence—Railroads.*—An engineman of a railway company cannot recover damages from his employer for injuries suffered while running his engine within the limits of a city at a higher rate of speed than that fixed by the ordinance, if such negligence proximately contributed to the injury, and it is immaterial that the company knew that the ordinance was regularly violated by its employees. The negligence in such case is negligence as a matter of law, and it would be contrary to public policy to relieve the engineman of the effect of his violation of law upon the ground that the company and its employees were in the habit of violating the particular law.
2. EVIDENCE—*Contributory Negligence—Pleading.*—In an action on the case the defendant may, under the plea of not guilty accompanied by the ground of defense that the plaintiff was guilty of contributory negligence, introduce any evidence which shows that the plaintiff was guilty of contributory negligence *per se*, or, being relevant, tends along with other facts and circumstances to show his contributory negligence.
3. INSTRUCTIONS—*Sufficiently Instructed—Harmless Error.*—A party is not prejudiced by the refusal of the court to give a correct instruction where, after reading other instructions to the jury, the court states the law to the jury substantially as requested in the rejected instruction.
4. EVIDENCE — *Speed Ordinances — Violation — General Reputation.* — Where an engineman was killed while violating a speed ordinance, it is generally not permissible for his employer to introduce evidence tending to show that the decedent had the reputation among his fellow-employees as a fast runner, and had previous to the accident in which he was killed and at the same point disregarded the speed ordinance.
5. EVIDENCE—*Speed Ordinances—Violation—General Reputation.*—In an action to recover for the death of an engineman killed while violating a speed ordinance where the uncontradicted evidence

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shows that at the time he was killed he was running his engine in the city limits at a speed of from twelve to fifteen miles an hour, whereas the maximum limit fixed by the city ordinance was only four miles an hour, evidence is not admissible which tends to show that he had the reputation of being a fast runner and had previously violated the ordinance.

Error to a judgment of the Law and Equity Court of the city of Richmond in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The following instructions were given by the court:

1. The court instructs the jury that if they believe from the evidence that at the time of the accident mentioned in the declaration and evidence the decedent, Jas. G. Rice, was employed as a locomotive engineer by the defendant company, and was performing his duties as such locomotive engineer, as set forth in the declaration, then the defendant company owed him the duty of exercising ordinary care to provide, and by supervision and inspection to maintain, a reasonably safe railroad track and roadbed, and reasonably safe rail joints and appliances in connection therewith, as were reasonably necessary to render the said railroad track reasonably safe for the use of the said Jas. G. Rice while performing his duties as such locomotive engineer. And whether the defendant company did, at the time in question, provide and so maintain such a reasonably safe track and rail joints as an ordinary prudent person would have done, under the circumstances, for the use of said Jas. G. Rice while so engaged in the performance of his duties, is a question of fact for the determination of the jury, from the evidence before them in this case.

Ordinary care is such care as persons of ordinary prudence would exercise under similar circumstances. And

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if the jury believe from the evidence that by reason of the failure of the defendant company to exercise such care the track of the defendant and joints of the rails in and near 14th street in the city of Richmond, mentioned in the evidence, became unsafe and caused the derailment mentioned in the evidence, and thereby the death of Jas. G. Rice was occasioned while he was in the exercise of such reasonable care as a prudent person would exercise under the same circumstances, then they should find for the plaintiff.

2. The court instructs the jury that knowledge by any railroad employee injured by the defective or unsafe character or condition of any railroad machinery, ways, appliances or structures shall be no defense to an action for injury caused thereby; and if the jury believe from the evidence that James G. Rice was injured by reason of the fact that the condition or character of the defendant company's machinery, ways, appliances or structures were not reasonably safe, viz.: that the track and roadbed in question crossing 14th street were out of repair or were improperly constructed, and were thereby rendered unreasonably unsafe to said Rice in the performance of his duties as engineer, and if they believe that the deceased, Rice, was attending to his accustomed duties, using such care as a man of ordinary prudence would use under the circumstances therein at the time he received the injury which caused his death, they must find for the plaintiff, notwithstanding they may believe from the evidence that he had knowledge of the unsafe condition or character of the said track and roadbed.

3. The court instructs the jury that the defendant was not the insurer of the plaintiff's intestate, and was not bound to provide the best and safest machinery, ways, appliances or structures, and if in the exercise of ordinary care it provided such as were reasonably safe for operating

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its trains at a reasonable and proper rate of speed, it discharged its full duty to the plaintiff's intestate, even though the jury shall further believe that safer machinery, ways, appliances or structures might have been employed.

4. The court instructs the jury that if they believe from the evidence that the tracks of the defendant company at the place of the accident were in a reasonably safe condition, they must find for the defendant.

5. The court instructs the jury that the burden is upon the plaintiff to show by a preponderance of the evidence that the death of Jas. G. Rice was due to the negligence of the defendant, its servants or agents, as alleged in the declaration, and the jury is instructed that if they believe from the evidence that his death may have resulted from one of two causes, for one of which defendant is responsible, but not for the other, the plaintiff cannot recover, nor can plaintiff recover if the jury believe from the evidence that it is just as probable that the death of the plaintiff's intestate was caused by the one as by the other.

6. The court instructs the jury that if they believe from the evidence that the accident to the plaintiff was caused by a piece or stick of wood falling upon the track of the defendant, and if the jury further believe from the evidence that the defendant's road at the place of accident had been inspected in the manner ordinarily in use by prudently conducted roads under like circumstances without discovering said piece or stick of wood, they must find for the defendant.

7. The court instructs the jury that if they believe from the evidence that an ordinance of the city of Richmond required engines at the place of the derailment to be propelled at no greater rate of speed than four miles an hour, and if the jury further believe from the evidence that at the time of the derailment the plaintiff's intestate was running the train at a greater rate of speed than four miles

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an hour, and if the jury further believe that the speed at which the train was being moved was negligent and in any way contributed to cause the derailment, the jury must find for the defendant.

8. If the jury believe from the evidence that the plaintiff should recover damages from the defendant company, then in ascertaining the amount of the damages, which shall not exceed ten thousand dollars ($10,000), they may consider:

(1) The pecuniary loss sustained by the widow and the children of Jas. G. Rice by his death, fixing the same at such sum as would be equal to the probable earnings of the said Rice, taking into consideration the age, business capacity, experience, habits, health, energy and perseverance of the deceased, during what would probably have been his lifetime, had he not been killed.

(2) In ascertaining the probability of life, the jury have the right to determine the same with reference to recognized scientific tables relating to the expectation of human life.

(3) By adding thereto compensation for the loss of his care, attention and society to his wife and children.

(4) By adding such further sum as they may deem fair and just by way of solace and comfort to said wife and children for the sorrow, suffering and mental anguish occasioned to them by his death.

And the jury may direct in what portion any damages they assess shall be distributed to the wife and children of the deceased.

The foregoing are all instructions of the court and must be considered and construed together and in the light of each other.

In addition to the foregoing instructions which were read to the jury, the court stated to the jury that the court was the judge of the law as applied to this case, and they

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were the judges of the facts and the weight of the testimony.

Of the said instructions, Nos. 1, 2 and 8 were instructions asked for by the plaintiff. Nos. 4, 5 and 6 were instructions asked by the defendant, and Nos. 3 and 7 were modifications or changes of instructions asked by the defendant. To giving of said instructions Nos. 1, 2 and 8 as asked for by the plaintiff, and the giving of instructions Nos. 3 and 7 in lieu of instructions asked for by the defendant, the defendant excepted.

Instructions tendered by the defendant, but rejected:

A. The court instructs the jury that if they believe from the evidence that the tracks of the defendant and its engines were in a reasonably safe condition upon and with which to operate a train at a legal and proper rate of speed, and if they further believe that the plaintiff's intestate was operating the train at a rate of speed prohibited by an ordinance of the city of Richmond, and that the speed at which the train was being moved directly contributed to cause the derailment, the jury must find for the defendant.

B. The court instructs the jury that Engineer Rice had no legal right to run his engine over the street at a greater rate of speed than four miles an hour, and if they believe from the evidence that Engineer Rice at the time of the derailment which resulted in his death was going faster than four miles an hour, and that such speed contributed to the accident, they must find for the defendant.

C. The court instructs the jury that while they are the judges of the facts, the court is the judge of the law, and it is the duty of the jury to accept and act upon the law as stated in the instructions, they applying the facts as they may determine them thereto.

D. The court instructs the jury that if they believe from

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the evidence that an ordinance of the city of Richmond required engines at the place of derailment to be propelled at no greater rate of speed than four miles an hour, and if the jury further believe from the evidence that at the time of the derailment plaintiff's intestate was running the train at a greater rate of speed than four miles an hour, the jury must find for the defendant.

E. The court instructs the jury that knowledge of the plaintiff's intestate of the defective or unsafe character or condition of any machinery, ways, appliances or structures of the defendant will not of itself be a bar to a recovery, but such knowledge may be considered in determining whether the plaintiff's intestate was guilty of contributory negligence if the jury believe from the evidence that the machinery, ways, appliances or structures of defendant were reasonably safe for the operation of the train at a legal and proper rate of speed, and if they further believe from the evidence that an ordinance of the city of Richmond required trains at the place of the accident to be propelled at no greater rate of speed than four miles an hour, and if they further believe from the evidence that at the time of the accident the train was being operated by the plaintiff's intestate at a greater rate of speed than four miles an hour, and that the speed with which the train was being moved directly contributed to cause the derailment, then the plaintiff's intestate was guilty of contributory negligence, and the jury must find for the defendant.

The opinion states the case.

Munford, Hunton, Williams & Anderson, for the plaintiff in error.

Hunsdon Cary and *Wm. Crump Tucker,* for the defendant in error.

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BUCHANAN, J., delivered the opinion of the court.

This is an action to recover damages for the alleged negligence of the Southern Railway Company, which resulted in the death of the plaintiff's intestate, James G. Rice.

The decedent was an engineman of the railway company in charge of one of its yard engines. His death was caused by the derailment and overturning of his engine at or near Fourteenth street, in the city of Richmond. Conceding that the evidence is sufficient to show that the defendant company was guilty of negligence in the construction and maintenance of its track where the engine was derailed, there was evidence tending to show that the deceased, when operating his train at the time he was injured, was violating a speed ordinance of the city of Richmond, and that if he had been operating his engine within the speed limit there would have been no accident and he would have suffered no injury, notwithstanding the condition of the track.

The speed limit fixed by the ordinance for engines, etc., on a railroad track in a street was not to be in excess of four miles an hour, and any one who propelled it at a greater rate of speed or caused it to be done, or assisted in doing it or causing it to be done, was subject to a fine of ten dollars.

There was evidence that the engine operated by the plaintiff's decedent was moving, with fifteen loaded and five empty cars, from the eastern end of the city over or across Fourteenth street, on a slight up-grade, on its way to Manchester; that just before reaching the line of Fourteenth street, or while in the street, the engine was derailed, passed over the street, over the sidewalk, into the yard on the west side of the street, over or across a side track, thence to another side track on which was stand-

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ing a box car, with which the engine collided and was overturned. The injuries causing the death of the plaintiff's intestate were from escaping steam, resulting from the overturning of the engine. The evidence further tended to show that the distance which the engine moved after it was derailed, before it collided with the box car, was some 130 feet or more, and that if the engine had been running within the speed limit it would not have gone, after it was derailed, with its train anything like that distance.

The principal question involved in this writ of error is as to giving and refusing instructions.

The contention of the defendant company is and was that the plaintiff was not entitled to recover if it appeared from the evidence that at the time her decedent was injured he was operating his engine in violation of the speed ordinance of the city, and that the excessive speed at which he was running his engine contributed to his injury. The plaintiff, on the other hand, insisted and insists that such violation of the ordinance did not bar her recovery unless the jury believed from the evidence that the plaintiff's intestate was operating his engine at a negligent rate of speed, and, if so, that such negligence contributed to his injury. In other words, the question involved is whether the violation of the ordinance, such violation contributing to the plaintiff's intestate's injury, amounted as a matter of law to contributory negligence, or was merely evidence tending to show contributory negligence.

The railway company insists that the case of *Reiger v. Atlantic & Danville R. Co.*, 95 Va. 418, 28 S. E. 590, and the cases in which it has been followed, sustain the railway company's contention; while, on the other hand, the plaintiff claims that the case of *Chesapeake & Ohio Ry Co. v. Jennings*, 98 Va. 70, 34 S. E. 986, directly, and certain other of our cases indirectly, sustain her contention.

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Without reviewing the cases relied on by either the plaintiff or defendant or attempting to harmonize the real or apparent conflict between them, if any, we will consider the question involved here as one of first impression in this State, since none of the cases relied on by either side present the question of the right of an engineman to recover damages from his employer for injuries suffered when running his engine in violation of a city ordinance and such violation directly contributed to his injury.

The text-books seem to be agreed that the general rule is that if the person injured was at the time he received the injury doing some act in violation of a statute or ordinance, he cannot recover, if such violation contributed to his injury.

Shearman & Redfield, in their work on Negligence, Vol. 1, sec. 104 (5th ed.), lay it down as the general rule that "if the plaintiff is acting in violation of a statute or ordinance at the time the accident occurred, and such violation proximately contributes to his injury, he is guilty of contributory negligence. But if such violation does not contribute to the injury, it is no defense."

Labatt on Master & Servant, sec. 362, says: "There can be no question that where a servant's injury was proximately caused by the fact that he was violating a statutory or municipal ordinance, the meaning and effect of which are perfectly clear, he cannot recover damages."

In Cooley on Torts (3rd ed.), Vol. 1, pp. 273-4, it is said that the fact that a party injured was at the time violating the law does not put him out of the protection of the law—he is never put by the law at the mercy of others. If he is negligently injured on the highway, he may have redress, notwithstanding at the time he was upon the wrong side of the road, provided that act did not contribute to his injury.

Twenty-nine Cyc. 525, in stating the general rule, says

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that "if the person injured was at the time of receiving the injury doing some act in violation of a statute or ordinance, such person cannot recover if such violation contributed to the injury, the violation amounting to contributory negligence."

In 7 Am. & Eng. Enc. Law (2nd ed.), the general rule is stated as follows: "It is not contributory negligence *per se* for the injured person at the time of his injury to be engaged in a violation of law, either positive or negative in its character. Before an illegal act or omission can be held contributory negligence, it must appear that such act or omission was a proximate cause of the injury. It is usually held that the mere collateral wrong-doing of the plaintiff cannot of itself bar him of his action when it did not proximately contribute to his injury." Thompson on Neg. (2nd ed.), sec. 11; Beech on Contributory Neg., sec. 47; 4 Dillon Mun. Corp. note, p. 3004, cases.

The general rule as laid down by the text-writers quoted and by others which might be cited seems to be fully sustained by reason and authority.

The reason why no recovery is permitted in such a case is based upon grounds of public policy. That principle of public policy is this (as stated by Lord Mansfield in *Holmes* v. *Johnson,* and quoted with approval in *Roller* v. *Murray,* 112 Va. 780, 783-4, 72 S. E. 665, 38 L. R. A. [N. S.] 1202)—"*ex dolo malo non oritur actio*—no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act, if from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa,* or the transgressions of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

While this rule finds its application more frequently

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in actions upon illegal contracts, it applies to cases in tort. It is immaterial, as was said by Judge Gray in *Hall* v. *Corcoran,* 107 Mass. 251, 253 (9 Am. Rep. 30), "whether the form of the action is in contract or in tort; the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part." See also 1 Am. & Eng. Enc. Law & Pr. 1024; 38 Cyc. 529-30, and cases cited in the notes to each; *Newcomb* v. *Boston Protection Dept., &c.,* 146 Mass. 596, 602, 16 N. E. 555, 4 Am. St. Rep. 354; *Broschart* v. *Tuttle,* 50 Conn. 1, 21 Atl. 925, 11 L. R. A. 33.

The case under consideration seems to come clearly within the general rule that, although a person has sustained damages, if the damages arose out of an illegal act or transaction in which he was engaged, he cannot recover.

In *Newcomb* v. *Boston Protection Dept., supra,* it was said in the opinion of the court that "no case has been brought to our attention, and upon careful examination we have found none in which a plaintiff whose violation of law contributed directly and proximately to cause him an injury, has been permitted to recover for it, and the decisions are numerous to the contrary."

It was held in *M. K. & T. Ry. Co.* v. *Roberts* (Texas), 47 S. W. 270, that an employee (an engineman) could not recover damages from his employer for injuries suffered while running his engine within the limits of a city at a higher rate of speed than that fixed by ordinance, if such negligence proximately contributed to the injury.

Little v. *Southern Ry. Co.,* 120 Ga. 347, 47 S. E. 953, 66 L. R. A. 509, 102 Am. St. Rep. 104, decides that an employee (engineman) of a railroad company cannot recover damages from his employer for injury suffered while running his engine in violation of a penal statute or a municipal ordinance, if such injury was proximately caused by such violation.

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In each of the two cases last cited it was sought, as in this case, to escape the effect of the plaintiff's conduct in violating the ordinance, etc., upon the ground that the defendant itself was responsible for such violation; but in each it was held, and properly so we think, that if the railway company knew that the ordinance was regularly violated by its employees it would not relieve the violator of the law of the effects of such violation. It would be contrary to public policy for the courts to relieve a person of the effect or consequence of his violation of law upon the ground that the railroad company and its employees were in the habit of violating the particular law.

The plaintiff insists that even if the evidence showed that her intestate was violating the city speed ordinance when injured, and that such violation directly contributed to his injury, and was therefore negligence as a matter of law, instructions "A," "B" and "E," which so told the jury, were properly rejected by the court because such violation of the ordinance was not stated in the railway company's grounds of defense.

One of these grounds of defense (the 5th) states: "That the plaintiff's intestate was guilty of contributory negligence." In order to prove that the plaintiff's intestate was guilty of contributory negligence, no other than the plea of "not guilty" was necessary. On motion of the plaintiff, the court ordered the railway company to file the particulars of its defense, which was done. No objection was made to the statement filed. Under the fifth ground stated, the railway company clearly had the right to introduce any evidence which showed that the plaintiff's intestate was *per se* guilty of contributory negligence, or being relevant tended to show, along with the other facts and circumstances of the case, contributory negligence.

From what has been said, it follows that the court is of opinion that the trial court erred in refusing to give in-

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structions "A," "B" and "E" offered by the railway company, and in giving instruction No. 7, which is in conflict with them.

The refusal of the court to give the following instruction offered by the railway company is assigned as error: "The court instructs the jury that while they are the judges of the facts, the court is the judge of the law, and it is the duty of the jury to accept and act upon the law as stated in the instructions, they applying the facts as they may determine them thereto."

While the instruction in question correctly stated the law, no prejudice resulted to the plaintiff in error from the court's refusal to give it, since the court stated to the jury, after reading to them the other instructions, that the court was the judge of the law as applied to the case, and they were the judges of the facts and the weight of the testimony.

The court refused to permit the railway company to introduce evidence tending to show that the plaintiff's decedent had the reputation among his fellow-employees as a fast runner and had, previous to the accident in which he was injured and at the same point, disregarded the speed ordinance. This action of the court is assigned as error.

The general rule is that such evidence is not admissible.

Prof. Wigmore, in his work on Evidence, sec. 65, in discussing the admissibility of evidence of that character, says: "A few courts have shown an inclination to admit exceptionally the character of a person charged with a negligent act (contributory negligence if a plaintiff) as throwing light on the probability of his having acted carelessly on the occasion in question; provided, that the other evidence leaves the matter in great doubt, or that the evidence is purely circumstantial, or (as sometimes put) that there are no eye-witnesses testifying. . . . Such evi-

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dence is no doubt likely to be of some probative value in such cases, and under the above limitations is hardly contrary to the ordinary policy of avoiding confusion of issues (*ante* 64). As a matter of law, however, the doctrine is maintained in a few jurisdictions only and has been expressly repudiated in many."

Even in those jurisdictions where this exceptional rule prevails, as stated by Prof. Wigmore, the rejected evidence would not have been admissible under the facts of this case, since the uncontradicted evidence shows that the engineer was running his engine at a speed of from 12 to 15 miles an hour instead of four miles, the maximum speed permitted by the ordinance. The court properly rejected the evidence.

For refusing to give instructions "A," "B" and "E" offered by the railway company, and for giving instruction No. 7, the judgment complained of must be reversed, the verdict of the jury set aside and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

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Syllabus.

Wytheville

SPRIGGS AND OTHERS v. JAMERSON.

June 12, 1913.

Absent, Cardwell, J.

1. NEW TRIAL—*More than Two to Same Party.*—As there is much diversity of opinion in other jurisdictions as to the proper interpretation of the statute declaring that not more than two new trials shall be granted to the same party in the same cause, this court will not undertake to construe it until a case arises in which it is necessary.
2. EJECTMENT—*Identification of Land Sued For—Case at Bar.*—Giving the evidence for the plaintiff in the case at bar, written and oral, all the weight it is entitled to, it cannot be said that it satisfactorily shows that the land which the plaintiff sues to recover is the same that was in the possession of the defendant.
3. EJECTMENT—*Plaintiff's Title—Identity of Land—Defendant's Title.*—Until the plaintiff in ejectment has made out a *prima facie* case for recovery by showing his right to the possession of the land sued for and identifying the same, the defendant is not required to show in what manner or by what title he held or obtained possession, and his failure to do so cannot strengthen the plaintiff's case.
4. APPEAL AND ERROR—*Erroneous Verdict—Record of Former Trial.*—While this court may, for some purposes, look to the record on a former writ of error in the same case, the question of whether or not the verdict of the jury upon the last trial should be set aside because contrary to the evidence can only be determined by a consideration of such evidence as was before the jury.
5. EJECTMENT—*Plaintiff's Title—What to be Proved—Exceptions to Rule.*—Generally, the plaintiff in ejectment must recover solely upon the strength of his own title, and not on the weakness of that of the defendant, and the plaintiff's title must be a legal title. The title to be proved by the plaintiff in order to entitle him to recover, as a general rule, must be either a grant from the Commonwealth, with which he connects himself by a regular chain of title, or he must prove such a state of facts as will warrant the jury in presuming a grant, or as will show adversary

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possession for the statutory period under a claim or color of title. While there are exceptions to the rule as well settled as the rule itself, amongst them, that the defendant without title or authority intruded upon the plaintiff or his ancestor who was in peaceable possession of the land when the defendant entered and took possession, the plaintiff in the case at bar has not brought himself within them.

Error to a judgment of the Circuit Court of Buckingham county in an action of ejectment. Judgment for the defendant. Plaintiffs assign error.

Affirmed.

The opinion states the case.

Harrison & Long, for the plaintiffs in error.

A. B. Dickinson, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is an action of ejectment in which there have been three trials. In each of them there was a verdict for the defendant. The first verdict was set aside, upon the motion of the plaintiffs, by the trial court, whether for errors of law in submitting the case to the jury or because the verdict was not sustained by the evidence, does not appear. The trial court refused, upon motion of the plaintiffs, to set aside the verdict on the second trial, but upon a writ of error to this court its judgment was reversed for errors of law, the verdict set aside and the cause remanded for a new trial. *Cole's Heirs, &c.,* v. *Jamerson,* 112 Va. 311, 317, 71 S. E. 618. Upon such new trial there was a verdict again for the defendant, which the plaintiffs moved to set aside, but the court overruled the motion and entered judgment thereon. To that judgment this writ of error was awarded.

The defendant insists that the trial court had no power

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to set aside the verdict rendered on the last trial, and that even if it had, there was no error in the proceedings for which it could have done so.

By section 3392 of the Code it is provided that "not more than two new trials shall be granted to the same party in the same cause." Although the provision quoted has been in force in this State for more than a century (Statutes at Large, New Series, Vol. 1, Ch. 16, sec. 33), it has never been passed upon or construed by this court in any reported case. The same, or substantially the same, provision is in force in a number of the States, and there is much diversity of opinion among them as to its effect. See 2 Thompson on Trials (2nd ed.), sec. 2727, and notes; 29 Cyc. 729-732; 3 Cyc. 457; 14 Ency. Pl. & Pr. 992-995. In some jurisdictions it is held not to restrict the common law right of the courts to grant new trials for errors of law, but only from granting new trials upon the ground that the verdict is not sustained by the evidence. See *Silsbo Lucas,* 53 Ill. 479; *Trott* v. *West,* 10 Yerg. (Tenn.) 499; *Knoxville Iron Co.* v. *Dodson,* 83 Tenn. 409-10, 416-17; *Burton* v. *Brashar,* 3 A. K. Marshall 1130, 1133; *Wildy* v. *Bonney's Admr.,* 35 Miss. 77; *Shirks* v. *Irons,* 47 Ind. 445, 450; *Harrison* v. *Cachelor,* 23 Mo. 117.

In West Virginia it is held that no more than two new trials can be granted to the same party in the same cause, although one or both the verdicts was set aside for misdirection of the court or for errors of law (*Watterson* v. *Moore,* 23 West Va. 404; *Williams* v. *Ewart,* 29 West Va. 659, 2 S. E. 881), and to the same effect were the earlier decisions in the State of Indiana. *Roberts* v. *Robinson,* 22 Ind. 456; *Judah* v. *Trustees,* 23 Ind. 272. There is a like diversity of opinion as to whether the provision in question applies to the trial court alone, or to both the trial and appellate courts. That such statutes do not apply to new trials granted in the appellate court was held

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in *Ill. Cent. Ry. Co.* v. *Patterson,* 93 Ill. 290; *Wildy* v. *Bonney's Admr.,* 35 Miss. 77; *Shirks* v. *Irons,* 23 Mich. 197. In Tennessee, Kentucky and Indiana it is held that it applies to appellate courts as well as to the trial court, where the new trial is granted by the appellate court upon the merits or the facts of the case, but not where the judgment is reversed for erroneous rulings of the lower court in the trial of the cause. *Knoxville Iron Co.* v. *Dobson,* 83 Tenn. 409, 416-418; *Burton* v. *Brashear,* 3 A. K. Marshall 1130, 1133; *Shirks* v. *Irons,* 47 Ind. 441, 450.

The constitutionality of the Tennessee statute (which is identical with ours) was attacked in *Louisville, &c., Ry. Co.* v. *Woodson,* 134 U. S. 614, 10 Sup. Ct. 628, 33 L. Ed. 1032, upon the ground that it violated the provisions of the fourteenth amendment to the Constitution of the United States, but its validity was sustained, upon the ground that as construed in that State it did not deprive the courts of the right to set aside more than two verdicts where the ground for setting aside a later verdict was for erroneous rulings of the court in the submission of the case to the jury and not upon the merits. No opinion is expressed in that case as to whether or not the statute would have been held valid if it had been construed to deprive the courts of the right to set aside a third verdict for erroneous rulings of the court as well as upon the merits.

Since there is such a diversity of opinion in other jurisdictions as to the proper interpretation of the statute in question, and as its construction is not absolutely necessary to a disposition of this case, because the action of the trial court in refusing to set aside the third verdict was clearly right upon the merits, this court ought not to undertake to declare the meaning or effect of the statute until a case arises in which its construction is required in order to dispose of the case.

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The verdict of the jury in favor of the defendant was based upon the ground, as stated therein, that the evidence failed to identify the land sued for. The will, codicils thereto and conveyances introduced in evidence and relied on by the plaintiffs to show that they had title to the land sued for do not describe the land by metes and bounds, or otherwise, so as to show that it is the land described in the declaration.

The plaintiffs introduced a witness named Mays, who testified "that he was 34 years old and had been acquainted with the land occupied by the defendant for twenty years or more; that he had lived there for about four years with his parents; that they rented the land of J. Monroe Coles; that he had accompanied his father when he went to pay rent, and that it was the very same land now occupied by the defendant; that the defendant had been in possession of the land, he believed, for eight or nine years; that he knew of no other lands in Buckingham county owned by J. Monroe Coles; that he did not know whether Monroe Coles had any deeds to the land or not, or whether Mr. Meem, of Lynchburg, had ever owned the land, nor did he know how many acres were in the tract." This witness (and he was the only witness who testified as to the identity of the land) does not show that the land sued for was the same land as that occupied by the defendant. While he states that his father rented the land which the defendant was in possession of from Monroe Coles, through whom the plaintiffs claim, he testifies that he does not know that Monroe Coles had any conveyance for it, or that Mr. Meem, through whom the plaintiffs claim, ever owned the land in the possession of the defendant. The witness' statement that he knew of no other lands in Buckingham county owned by Monroe Coles does not show that Coles did not own other lands in the county. Neither does the fact agreed, that Monroe Coles did not

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by his will devise any land in Buckingham county, show that the land sued for is the same land as that in the possession of the defendant.

Giving the evidence, written and oral, introduced by the plaintiffs all the weight that it is entitled to, it cannot be said that it satisfactorily shows that the land which the plaintiffs sued to recover was the same land that was in possession of the defendant.

It is suggested in argument that the failure of the defendant to state in his grounds of defense under what title he claimed, or that he claimed under any title or claim of right, and his failure to introduce any evidence whatever shows that he was a mere intruder on the land in his possession, and that these facts should be considered in passing upon the question of the identity of the land.

Until the plaintiffs had made out a *prima facie* case for recovery by showing their right to the possession of the land sued for and identifying the same, the defendant was not required to show in what manner or by what title he obtained or held possession, and his failure to do what he was under no obligation to do could not strengthen the plaintiffs' case. If the evidence in the case, as shown by the record upon the former writ of error, had been before the jury, it may be it would have been sufficient to have identified the land, as the plaintiffs' counsel insists; but while this court may look to that record for some purposes, the question of whether or not the verdict of the jury upon the last trial should be set aside because contrary to the evidence, can only be determined by a consideration of such evidence as was before the jury.

But even if the evidence had been sufficient to identify the land in possession of the defendant as the land described in the declaration, the jury could not rightly have found a verdict in favor of the plaintiffs. The general rule is that the plaintiff in an action of ejectment must recover

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solely upon the strength of his own title, and not on the weakness of that of the defendant, and the plaintiff's title must be a legal title. The title to be proved by the plaintiff in order to entitle him to recover, as a general rule, must either be a grant from the Commonwealth, with which he connects himself by a regular chain of title, or he must prove such a state of facts as will warrant the jury in presuming a grant, or as will show adversary possession for the statutory period under a claim or color of title. *Sulphur Mines Co.* v. *Thompson's Heirs,* 93 Va. 293, 309-10, 25 S. E. 232; *Tapscott* v. *Cobb,* 11 Gratt. (52 Va.) 172, 174; *Va. Mid. R. Co.* v. *Barbour, Rec'r,* 97 Va. 118, 122, 33 S. E. 554.

The plaintiffs made no effort to connect themselves with the Commonwealth, nor did they show such a state of facts as would have justified the jury in finding that they had legal title to the land.

But there are exceptions to the rule as well settled as the rule itself. The exception relied on in this case to take it out of the general rule is that the defendant, without title or authority, intruded upon the plaintiffs or their ancestor, who was in peaceable possession of the land when the defendant entered and took possession. *Tapscott* v. *Cobb, supra.* This contention is not sustained by the record. The evidence does not show that the plaintiffs' ancestor, Monroe Coles, was in the possession of the land when he died; neither does it show that the plaintiffs were ever in possession of it, nor that the defendant had tortiously entered upon it.

Upon the whole case the court is of opinion that there is no error in the judgment complained of and that it should be affirmed.

Affirmed.

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Syllabus.

Wythevilleе

STRATTON'S ADMINISTRATOR v. NEW YORK LIFE INSURANCE COMPANY.

June 12, 1913.

Absent, Keith, P.

1. LIFE INSURANCE—*Forfeiture—Failure to Pay Premiums—Application of Interest in Reserve Fund—Loans—Set Off.*—Upon a life insurance policy which had been in force seven years, the assured borrowed of the company $100. The policy subsequently lapsed for non-payment of a premium. At the date of the lapse there was a balance of $42.22 to the credit of the assured in the hands of the company from the reserve fund due him after deducting the loan of $100.00 and all other indebtedness to the company. The policy provided that the assured might, upon demand, have a policy written for the amount of paid up insurance specified in the policy less the amount of any indebtedness on the policy, or that the policy would, after the repayment of any indebtedness, be extended without request or demand, for the face amount thereof during the term provided in the policy, payable only if the insured died within said term. The $42.22 was sufficient to purchase paid up insurance to the amount of $105.00, or to extend the policy at its face value of $2000.00 for a period of one year and three months. The assured made no demand for a paid up policy and died within a year from the lapse of the premium. The company continued to request the payment of the premium up to the death of the assured and after his death denied liability for any greater sum than one hundred and five dollars, insisting that the lapsed premium and the loan should have been paid out of other funds than the assured's interest in the reserve.

Held: The assured not having demanded a paid up policy, the policy was automatically kept in force for a year and three months, and, the assured having died within that period, his personal representative is entitled to recover the full face value of the policy. The assured had the right to set-off the amount due him by the company against what he owed the company, in the absence of any agreement to the contrary, as might have been

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done in any other case between a debtor and creditor. Insurance companies who lend money to their policyholders stand in no different position from other lenders.

2. LIFE INSURANCE—*Loan Agreement—Forfeiture—Waiver.*—The "loan agreement" in the case at bar, under which the assured borrowed $100.00 of the insurance company, did not waive, either expressly or impliedly, any of the "non-forfeiture" privileges of the assured under his policy.

3. LIFE INSURANCE—*Policy—Forfeiture.*—The policy in suit was not automatically forfeited. In order to effect a forfeiture of it some affirmative action on the part of the insurer was necessary during the currency of the policy, but none was taken.

4. LIFE INSURANCE—*Policy Strictly Construed.*—The maxim that the words of an instrument shall be taken most strongly against the party employing them, is peculiarly appropriate in the construction of a policy of insurance. The instrument is wholly the work of the underwriter and is usually filled with a multitude and variety of stipulations seldom read by the assured when he accepts the policy, and, if read, rarely, if ever, understood, abounding in forfeitures and in provisions generally harsh and difficult of performance, and hence it should be strictly construed against the insurer and liberally in favor of the insured.

Error to a judgment of the Corporation Court of the city of Lynchburg in a proceeding by motion for a judgment on a life insurance policy. Judgment for the defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

Thos. J. Williams and *Wilson & Manson,* for the plaintiff in error.

F. S. Kirkpatrick, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This is an action upon notice under the statute brought by the administrator of Alexander B. Stratton, Jr., deceased, against the New York Life Insurance Company to

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recover of the latter the amount of an insurance policy alleged to have been held by the plaintiff's intestate and in force at the time of his death.

It appears that the defendant company issued to plaintiff's intestate on April 26, 1898, a policy of insurance for the sum of $2,000, which policy contained what is called "a policy loan agreement"; that on October 30, 1905, the insured obtained from the company a loan of $100 upon his policy as collateral, executing therefor also a "policy loan agreement," which loan had not been repaid in cash at the date of the insured's death, caused by drowning, on the 13th of November, 1907; that when the premium on the policy for the year beginning April 26, 1907, became due, the insured made a contract with the insurance company in regard thereto, which is evidenced by a writing signed by the insured, called a "Blue Note" (on account of the color of the paper on which written), which note was for the sum of $28.00, with interest, payable on or before August 26, 1907, and set forth that the note was accepted by the insurance company, together with $10.20 in cash, on the following express agreement: "That although no part of the premium due on the 26th day of April, 1907, under Policy No. 862036, issued by said company on the life of A. B. Stratton, Jr., has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said company as payment of said premium and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the date it becomes due, it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under

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said policy shall be the same as if said cash had not been paid nor this agreement made; that said company has duly given every notice required by its rules or the laws of any State in respect to said premium, and in further compensation for the rights and privileges hereby granted the maker hereof has agreed to waive, and does hereby waive, every other notice in respect to said premium or this note, it being well understood by said maker that said company would not have accepted this agreement if any notice of any kind were required as a condition to the full enforcement of all its terms."

When said note matured on August 26, 1907, the insured, Stratton, executed another "Blue Note" for $18.00, payable on or before October 26, 1907, reciting that the note was accepted by the company at the request of the maker, together with $20.20 in cash, on a certain express agreement, which is practically the same as contained in the "Blue Note" quoted from above. When the last mentioned note became due, on October 26, 1907, it was not paid, and a new note was sent to the insured for execution by him, but it was never executed or returned to the company, and upon the lapse of the policy by reason of the insured's failure to settle this note, the company wrote, on the 29th of October, 1907, to the insured, requesting him to revive his policy, and to that end enclosed a note for $12.00, with the request that he execute and return the same, along with $6.15 in cash, to be received by the company in settlement of the premium on his policy for the year beginning April 26, 1907, which note was not executed by the insured, nor was the $6.15 in cash paid.

This, it appears, was the situation existing between the insured and the insurer up to November 13, 1907, on which date the insured died, and proofs of his death were duly furnished the company, as required by the terms of the policy. It is admitted, however, by the company that at

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the date of the lapse of the policy, on October 26, 1907, after deducting the loan of $100 upon it, as aforesaid, and any other indebtedness upon the policy from the reserve due the insured thereon, there was a balance of $42.22 to the credit of the insured then in the hands of the company, which, according to its application, would either have purchased for the insured $105 of paid-up insurance, or would have served to secure for the insured an extension of the policy, at its face value of $2,000, for a period of one year and three months from April 25, 1907. Whether or not it was competent, under the circumstances, for the company to apply the said balance to the purchase of paid-up insurance, or said balance should have been applied in the purchase of extended insurance, are questions unsettled by the agreed statements of facts appearing in the record.

The insurance company, before any action was commenced on said policy, tendered to the insured's personal representative $105 in settlement of its liability under the policy, which was not accepted, and thereupon this action was brought.

When the cause was called for trial, a jury was waived by both parties and all questions of law and fact were submitted to the court for decision upon the issue joined; whereupon the court, upon two statements of facts, agreed to by the parties, entered its judgment for the plaintiff in the sum of $105, instead of the sum of $2,000, the face value of the policy claimed by the plaintiff, to which judgment the plaintiff applied for and obtained this writ of error.

The principal question presented is to which of the two ways should the balance of $42.22, admittedly to the credit of the insured at the date of the lapse of his policy on October 26, 1907, after deducting the $100 loan upon the policy, have been applied—to the purchase of paid-up insurance, or to the purchase for the insured of an extension

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of his policy at its full face value of $2,000 for a period of one year and three months from the 25th of April, 1907? A decision of this question necessarily must turn upon the construction and interpretation of the contract between the insurer and the insured as evidenced by the policy and the "loan agreement."

The provisions of the policy which relate to the question are set out under the heading of "Benefits and Provsions," and are as follows:

"2.—NON-FORFEITURE.

"This Policy Cannot Be Forfeited After It Shall Have Been in Force Three Full Years as Hereinafter Provided.

"First—If any subsequent premium is not duly paid, this Policy will be endorsed for the amount of paid-up insurance, payable at the death of the insured, specified in the table on the preceding page, less the value of any indebtedness on this Policy, provided demand is made therefor, with surrender of this Policy, within six months after such non-payment; or,

"Second—If any subsequent premium is not duly paid, and if this Policy is not surrendered as provided in the preceding clause, the insurance under this Policy will, after the repayment of any indebtedness, be extended without request or demand therefor, for the amount of Two Thousand Dollars, during the term provided in the table on the preceding page, payable only if the insured dies within said term. At the end of said term, if the insured is then living, this Policy shall cease and determine.

"Third—The insurance provided for in the two preceding clauses shall be based upon completed insurance years only, and shall be subject to the conditions of this Policy, but without further payment of premiums and without loans or participation in surplus."

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We need not advert to the "table" referred to in the foregoing provisions, set out in full on the second page of the policy, under the heading of Special Advantages. Table of Loans and of Surrender Values in Paid-up Insurance, or Extended Insurance, &c., further than to say that the terms provided therein do not militate against the view for which plaintiff in error contends, that under the provisions of the policy, upon default in the payment of any premium, the insurance was automatically extended, without any action whatever on the part of the insured, provided there was to his credit on the reserve fund an amount sufficient to pay the company any indebtedness due it from the insured, and to purchase for him extended insurance for at least one year from the due date of the premium on the policy as to the payment of which default was made, to-wit, on April 26, 1907, unless the insured made demand for paid-up insurance, which demand was not in this case made.

Under the "Non-Forfeiture" provisions of the policy, when it lapsed on October 26, 1907, for non-payment of the premium for the year beginning April 26, 1907, and no demand had been made for paid-up insurance, as is conceded, did the policy become forfeited, and, if not, was not the insured entitled to the benefit of extended insurance in accordance with the terms of the second clause thereof?

That the policy was not forfeited, but was extended as in full force for a period of one year and three months from April 26, 1907, during which period insured died and the insurer became liable to the personal representative of the deceased for the amount of the face value of the policy is also conceded, unless the right to this extended insurance was lost to the insured by the non-payment in cash of the $100 loan he had obtained from the insurer, notwithstanding he had to his credit with the insurer a fund sufficient to repay the said loan and to purchase an extended insurance under his policy for a period extending beyond his death.

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As it seems to us, there was no indebtedness due from the insured to the insurer when the policy lapsed on October 26, 1907, but on the contrary the company was, after deducting the indebtedness of the insured to it, due the insured a balance of $42.22, an amount sufficient to purchase an extended insurance for a period beyond his death, and he had not applied for paid-up insurance for the amount of this balance; and that by the very terms of the contract between the parties the insured had the right to rely, as doubtless he did, upon the provision contained in clause second of his policy, that he should be entitled to have the balance to his credit with the insurer applied to the purchase of extended insurance, unless he demanded paid-up insurance and surrendered his policy.

The position taken by the insurance company (defendant in error here) is that plaintiff in error's intestate owed it $100 of borrowed money, and while it owed the insured $142.22, instead of striking a balance and giving to the insured $42.22 worth of extended insurance, it had the right to and did demand that the $100 loan be first repaid to it, not out of the $142.22 to the credit of the insured, but from other sources, before it was called upon to give to the insured $42.22 worth of extended insurance. In other words, defendant in error denies that the insured had the right to set off against his loan of $100 the $142.22 to his credit with defendant in error, and contends that because the $100 loan had not been paid from other sources, no part of the $142.22 to the credit of the insured, though applicable to the repayment of the loan, should have been applied to the purchase of extended insurance under the policy.

This contention is not borne out by the language of the contract between the parties. Under the heading "General Regulations" in the contract is this clause: "Any indebtedness to the company, including any balance of the

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current year's premium remaining unpaid, will be deducted in any settlement of this policy or of any benefit thereunder." The defendant in error might have had the right to declare the policy in question forfeited by the non-payment of the premium thereon for the year beginning April 26, 1907, but this it did not do, but instead treated the policy as in force and sought to have the unpaid premium paid until after the death of the insured, and for weeks after it occurred, certainly up to the time it heard of the insured's death. It is not pretended that the policy was forfeited by reason of the non-payment of a premium matured theron, but because of the non-payment of borrowed money under the "Loan Agreement," which is in effect to claim that the phrase "after the repayment of any indebtedness" contained in the policy, absolutely forfeited the right to extended insurance immediately upon the insured's contracting a debt with his insurer, and this too regardless of how small the debt or how large a sum there might be to the credit of the insured, by way of reserve upon his policy, in excess of the contracted debt. Had there been no debt for a loan contracted pursuant to the provisions of the policy in this instance, it would hardly be claimed that defendant in error would have had the right to declare the policy forfeited, as it did on December 24, 1907, over a month after the death of the insured, when it had in its hands on October 26, 1907, money enough to purchase for the insured extended insurance for a period extending beyond his death; so that the forfeiture of the policy, as remarked, is not based upon the failure to pay a premium due thereon, but upon the non-payment from other sources than the reserve fund to the credit of the insured of a debt for money borrowed.

Forfeitures are not favored in law, and when they are mere penalties for the non-payment of borrowed money they are not allowed.

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In *N. Y. Life Ins. Co.* v. *Curry,* 115 Ky. 100, 72 S. W. 763, 61 L. R. A. 268, 103 Am. St. Rep. 297, it is said: "The courts have uniformly held in favor of the insurer that agreements for the forfeiture of the policy when premiums were not paid when due are valid, and their enforcement is upheld. This is said to be because 'on the prompt payment of the premiums depends the mutuality of the contract and the ability of the insurance company to meet its obligations.' But both the reason and the rule are restricted to the matter of premium alone. Forfeitures are disfavored in law. When they are mere penalties for the non-payment of borrowed money, they are not allowed. They lead to, and themselves are, unconscionable oppressions of the unfortunate."

As said by this court in *Knights of Columbus* v. *Burroughs,* 107 Va. 688, 60 S. E. 46, 17 L. R. A. (N. S.) 246, "courts are astute to discover modes of escape from declaring a forfeiture."

The case of *N. Y. L. Ins. Co.* v. *Curry, supra,* is also authority for the proposition that when an insurance company loans money to one of its policy holders, it is in no different position from any other lender of money; and in lending its money it is subject to the same general rules and principles governing banks, trust companies and other such corporations engaged in lending money. This general rule is, that a borrower, say from a bank, when his loan falls due, has the right to offset against the loan any amount to his credit with the bank—a privilege which works equally in favor of the bank—and it is difficult to perceive a reason why an insurance company lending money to its policy holders should not be subject to the same rule, especially so in the absence of a different rule stipulated for and clearly expressed in the contract between the parties. The "table" made a part of the policy here in question was not, as appears to us, put there to restrict the

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rights of the insured, but to give expression to the argument that at the end of three years from the date of the policy there was a certain reserve value to the credit of the holder of the policy, which reserve increased each year that the policy continued in force, and that upon the lapse of the policy for the non-payment of a premium maturing thereon, the insured, under the heading, "Special Advantages," showing what this reserve value would purchase at the end of any year, had the right, by refraining from demanding paid-up insurance therefor and surrendering his policy, to rely upon the provision made for him in his contract that this reserve fund, after deducting therefrom "any indebtedness to the company, including any balance of the current year's premium remaining unpaid," would be applied to the purchase for him of extended insurance.

"The 'table' could not prescribe the amount of continued or paid-up insurance in case of indebtedness of any kind, because the extent of the continued or paid-up insurance would be dependent upon the amount of the indebtedness to be first deducted before the continued or paid-up insurance was computed. The 'table' is inserted in the policy to show the rights of or benefits to the insured in continued or paid-up insurance in case of default at specified times in paying the premium to become due on the policy. . . ."

"The time that the insurance would be extended, or the amount of the paid-up insurance was definitely fixed and determined in the policy in all cases where it was possible to so fix and determine the time or the amount in advance. In all cases of indebtedness the continued or paid-up insurance was dependent upon the amount of indebtedness. The fact of an indebtedness to the defendant did not forfeit the right to continued or paid-up insurance, but simply left the time of the extension or the amount of the paid-up insurance dependent upon a computation to be made when

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the amount of the indebtedness was determined." *Taylor v. N. Y. Life Ins. Co.*, 197 N. Y. 324, 90 N. E. 964.

We are unable to appreciate the force of the argument on behalf of the defendant in error, that the "Loan Agreement" changed the contractual relations between the insured and the insurer. This agreement does not provide that if default should be made in the payment of any premium on the policy, or any interest on the loan, on the date when due, the defendant in error, without demand or notice of any kind, might deduct the amount due on the loan from the reserve on the policy computed as stipulated for in the agreement, and the balance of the reserve fund so computed would be taken as a single premium of life insurance at the published rates of the company, and shall be applied to the purchase of paid-up or extended insurance upon the life of the insured under said policy, at the age of said insured on said due date, payable under the same conditions as the original policy, without premium return, participation in profits, or further payment of premiums; but the purpose of this "Loan Agreement" was doubtless intended as providing a method of collecting and securing to defendant in error, the insurer, the loan of $100, which method was by foreclosure of the policy, and upon foreclosure the only privilege remaining in the insured was the right to paid-up insurance for an amount to be computed by the insurer after the indebtedness had been deducted from the reserve value of the policy. We cannot construe this "Loan Agreement" as a waiver on the part of the insured, either expressly or impliedly, of any of his "Non-Forfeiture" privileges under the policy, but these privileges, as it seems to us, remained intact to the insured, subject, however, to the right of the insurer to cancel and foreclose the policy whenever it chose so to do after default in the payment of any premium past due and owing on the policy, or in the payment of interest due on the loan made thereon; but again it is to be observed that defendant in error

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did not avail itself of this right and did not attempt a foreclosure of the policy until after it had incurred a loss thereon by reason of the death of the insured weeks before any action towards a foreclosure of the policy was taken, and after it had treated the policy as in full force and had endeavored to collect the "Blue Note" taken for unpaid premiums or to get from the insured renewals of this note. The foreclosure of the policy was neither automatically effected on October 26, 1907, upon the failure of the insured to pay the "Blue Note" due on that date, nor was it effected on that date, or after, and before the death of the insured by any affirmative action on the part of the defendant in error. To effect a foreclosure of the policy some affirmative act was required on the part of the defendant in error. *Brady* v. *Prudential Ins. Co. of Amer.* 9 Misc. Rep. 6, 29 N. Y. Supp. 44; 3 Cooley's Briefs on Ins., 2261, 2278; *O'Brien* v. *Prudential Ins. Co. of Amer.*, 12 Mis. Rep. 127, 33 N. Y. Supp. 67.

As we have seen, the defendant in error took no action towards effecting a foreclosure of the policy here in question until weeks after the death of the insured. On the contrary, instead of availing itself of its right to foreclose immediately on default in the payment of the "Blue Note" falling due on October 26, 1907, defendant in error delayed the foreclosure of the policy until December 24, 1907, and in the mean time conducted a correspondence addressed to the insured, endeavoring to have him reinstate his policy, all of its letters admitting that the "Non-Forfeiture" benefits of the policy were in force pending foreclosure by the company, and one of these letters, dated October 29, 1907, inclosed to the insured to be signed by him a "Blue Note" for the amount of the balance of unpaid premiums, upon the face of which note appears the following: "This note is deposited with the New York Life Insurance Company pending the consideration by said Company at its Home Office of an application for the res-

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toration of Policy No. 862036 on the life of Alexander B. Stratton, Jr., which policy, by the non-payment of premium due April 26, 1907, is not now in force *except as may be provided by the non-forfeiture benefits contained therein.*" (Italics ours.)

We again advert to the provision of the policy that provides that in order to entitle the insured to paid-up insurance he must have made demand therefor, and there is no pretense that such demand was ever made; and further, that the "non-forfeiture" provisions of the policy stipulated that in these circumstances the only benefit remaining to the insured was the right to extended insurance.

The case of *Eagle* v. *N. Y. Life Ins. Co.*, 48 Ind. App. 284, 91 N. E. 814, relied on as authority in this case, does not sustain the position taken by defendant in error. In that case the insurance company foreclosed the loan made on the policy, and the question decided was, whether the provision in the loan agreement providing for foreclosure without legal notice was illegal; and the court merely held that such provision was legal and that the foreclosure in that case had been properly made. No such question is involved in the case at bar.

It is said in the opinion of this court by Burks, J., in *Georgia Home Ins. Co.* v. *Kinnier's Admr.*, 28 Gratt. (69 Va.) 105, and afterwards cited in later cases: "The maxim, that 'the words of an instrument shall be taken most strongly against the party employing them,' is peculiarly appropriate in the construction of a policy of insurance, and especially of such conditions as we are now considering. The instrument is wholly the work of the underwriter, and is usually filled with a multitude and variety of stipulations seldom read by the assured when he accepts the policy, and, if read, rarely if ever understood, abounding in forfeitures and in provisions generally harsh and difficult of performance, it should be strictly construed against the insurer, and liberally in favor of the insured.

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A modern writer on insurance thus states the rule: 'No rule, in the interpretation of a policy, is more fully established, or more controlling and imperative, than that which declares that, in all cases it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to indemnity, which, in making the insurance, it was his object to secure.' May on Insurance, 182."

In the light of this universally recognized rule of construction, and in view of the agreed facts made a part of the record in this case, until the policy in question was foreclosed the ownership of it and the assured's rights under it were not affected, one of these rights being that of having the indebtedness to the insurer paid out of the amount to his credit from the reserve fund stipulated for in the policy, and the balance of this reserve applied to the purchase of extended insurance, and that too without any request or demand on his part. There being enough money to the credit of the insured with the company to pay it the loan he had obtained on his policy and to continue the policy as extended insurance for one year and three months from the time of default in the payment of the premium which matured April 26, 1907, during which period, and before the defendant in error attempted to exercise its right to foreclose the policy, the insured died, the agreement of defendanet in error to pay $2,000 to the deceased's personal representative became absolute and final.

For the foregoing reasons we are of opinion that the judgment of the trial court is erroneous, and it will, therefore, be reversed and annulled, and this court will enter here judgment for $2,000 in favor of plaintiff in error against defendant in error for the face value of the policy sued on, with interest thereon from the 13th day of November, 1908, till paid, and costs.

Reversed.

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Wythevilleㅤ

UNITED STATES OF AMERICA v. WM. R. TRIGG CO.

June 13, 1912.

Reheard June 12, 1913.

1. APPEAL AND ERROR—*Res Judicata—Second Appeal—Expression not Necessary to First Decision.*—What was decided in a case pending on appeal is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law of the case and must control its disposition; but this rule does not apply to expressions of opinion on matters, the disposition of which was not required for the decision, and certainly not to matters which were neither mentioned nor necessary to be considered.
2. UNITED STATES—*Contractural Powers—Exemption From Registry Laws of State.*—The United States, as an incident of its sovereignty, has capacity to contract co-extensive with the duties and powers of government, and this power carries with it complete exemption from all obligation to comply with state registry laws. It is not necessary for it to comply with the registry laws of the State in order to preserve a lien created by contract with it. The lien, without recordation, simply takes its place, and is superior to the claim of all other creditors who have no prior lien.

ON A REHEARING.

3. *Res Judicata.*—The present controversy between the United States and the general creditors of the Wm. R. Trigg Co., with respect to the vessels "Mohawk" and "Galveston," is not *res judicata* by reason of prior decisions of this court or of the Supreme Court of the United States.

Appeal from a decree of the Chancery Court of the city of Richmond. The United States appeals from an adverse decision in a controversy between it and other creditors over a fund under the control of the court.

Reversed.

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The opinion states the case.

L. L. Lewis, R. H. Talley and *D. Lawrence Groner,* for the appellant.

Munford, Hunton, Williams & Anderson, E. P. Cox, T. C. Gordon, Jordon Leake, Jo. Lane & Carry Ellis Stern, George Bryan and *Coke & Pickrell,* for the appellees.

HARRISON, J., delivered the opinion of the court.

This case has several times been before this court, the last time under the style of *Hawes & Co.* v. *Wm. R. Trigg Co.,* 110 Va. 165, 65 S. E. 538, which was on appeal reviewed by the Supreme Court of the United States under the style of *"United States* v. *Ansonia Brass & Copper Co.,* 218 U. S. 452, 54 L. Ed. 1107, 31 Sup. Ct. 49.

At the time these insolvency proceedings were instituted against the appellee company, there were three vessels, for the United States, in process of construction at its shipyard at Richmond, Va., namely, a sea-going suction dredge for the War Department, called the "Benyuard," a revenue cutter for the Treasury Department, called the "Mohawk," and a cruiser for the Navy Department, called the "Galveston." In the progress of this litigation it has been finally decided by the Supreme Court that the "Benyuard" belonged to the United States, and that it was not liable for the debts of the appellee. All controversy as to this vessel is, therefore at an end, and it is no longer involved in this suit.

It has also been finally settled by this court in *Hawes & Co.* v. *Trigg Co., supra,* and affirmed by the Supreme Court in *United States* v. *Ansonia Brass and Copper Co., supra,* that, as between the United States and the supply lien creditors of the Wm. R. Trigg Company, the latter had

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priority of lien upon the "Mohawk" and the "Galveston." Since the final settlement of that question the supply lien creditors have all been satisfied.

The present controversy involves the right of the United States to preference over the general creditors of the Wm. R. Trigg Company in favor of certain contractual liens held by them against the "Mohawk" and the "Galveston."

These two vessels were built by the Trigg Company under contracts with the United States, which provided for a lien upon each vessel in favor of the government for all moneys advanced by it on account thereof during the progress of the work. At the time of the appointment of the receiver, these vessels were in course of construction and the government had made large payments upon each, and it is for the satisfaction of these contractual liens that the appellants now insist that they are entitled to priority over the claims of the general creditors of the William R. Trigg Company. The existence of these contractual liens in favor of the government has been recognized throughout this litigation. It is, however, contended by the appellees that these liens cannot be given preference over the general creditors of the Trigg Company, because the United States has failed to comply with the Virginia registry laws by having the contracts reserving such liens recorded. It is further insisted that this court has held, in *Hawes & Co.* v. *Trigg Co., supra.* which decision has been affirmed in that respect by the Supreme Court in *United States* v. *Ansonia Brass, &c., Co., supra,* that these contractual liens in favor of the appellants against the "Mohawk" and the "Galveston" are invalid and cannot be enforced as against the appellees because unrecorded, and that, therefore, the question of the validity of such liens, so far as the general creditors are concerned, is *res judicata;* and, further, that if the question of the validity of such liens has not been already finally decided in this litigation adversely to the United States, it must now be so decided.

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An examination of the record and the opinion of this court on the former appeal in the case of *Hawes & Co.* v. *Trigg Co., supra,* shows very clearly that the question now raised between the United States and the general creditors of the Trigg Co. was not considered or intended to be dealt with at that time. The only questions then under consideration were those dealt with in determining the controversy between the supply lien creditors of the Trigg Co. and the United States. Nowhere in the elaborate petition for appeal in that case is there mention of any creditors save the supply lien creditors. It is true that one of the grounds relied on in the support of the priority of claim in favor of the supply liens was that the contractual liens in favor of the United States were void as to creditors under the recordation statute of the State, but that question was not even mentioned in the decision of the case. The court very clearly and succintly states the question to be determined by it in these words:

"The question decided by the lower court and presented on this appeal is whether title to these several vessels was in the government or the Trigg Company, and, if in the latter, have its creditors who have sued out and caused to be recorded, in accordance with the labor and supply lien statute of the State, claims for supplies furnished the Trigg Company above referred to, priority of right to satisfaction over the rights of the government in the said vessels."

After carefully considering the case as stated, the court announced its conclusion, that the supply lien creditors were entitled to priority over the contractual liens of the government, not because the Uuited States had failed to record their contractual liens, but because, as clearly shown by the provisions of the contracts reserving those liens, it was intended that they should be inferior to the supply liens. On appeal the Supreme Court took this view, and affirmed the decision of this court as to the "Mohawk" and the "Galveston."

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The Virginia recording acts were not mentioned in the opinion of this court or in that of the Supreme Court, and it cannot be presumed that either court intended to decide such a far-reaching and important question as that the contracts of the United States are subject to State registry statutes, without even mentioning the subject, especially when it is clear that the decision of so vital a question was not necessary to a disposition of the controversy then before the court.

Certain expressions in the opinion of this court are relied on as tending to show that the intention was to hold that the contractual liens in favor of the United States were not superior to the claims of the general creditors. The expressions relied on are wholly insufficient to justify the use that is sought to be made of them. It is manifest from the whole opinion that the court at no time had any such question in its mind.

As said by Mr. Justice Field in *Barney* v. *Winona, &c., R. Co.*, 117 U. S. 228, 29 L. Ed. 858, 6 Sup. Ct. 654: "We recognize the rule, that what was decided in a case pending before us on appeal is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law of the case and must control its disposition; but the rule does not apply to expressions of opinion on matters, the disposition of which was not required for the decision."

Looking to the whole record, including the decision of this court and that of the Supreme Court on the former appeal, we are of opinion that the lower court erred in holding the question presented by this appeal to be *res judicata*.

That question, which will now, for the first time, be considered and decided by this court in this litigation, involves the right of the United States, by virtue of its contractual liens upon the "Mohawk" and the "Galveston" to priority, as to those vessels, over the general creditors of the

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Wm. R. Trigg Company. In other words, are the United States bound to comply with the State registry laws and have their contracts recorded in order to make effective and available the liens reserved in such contracts, as against those who have no liens?

In the light of the decisions of the Supreme Court of the United States, it is clear that this question must be answered in the negative.

In *United States* v. *Maurice,* 2 Brock 96, Fed. Cas. No. 15,747, Chief Justice Marshall decided, as the Supreme Court of the United States in subsequent cases has repeatedly held, that the power of the Federal government to contract is one of the means necessary to accomplish the objects for which the government was established, and that this capacity to contract is co-extensive with the duties and the powers of government. No power, indeed, is more essential to the maintenance of the government. A different principle would involve a denial of the ordinary rights of sovereignty. *United States* v. *Tingey,* 5 Peters 115, 8 L. Ed. 66; *United States* v. *Bradley,* 10 Peters 343, 9 L. Ed. 448; *Van Brocklin* v. *State of Tennessee,* 117 U. S. 151, 29 L. Ed. 845, 6 Sup. Ct. 670; *Moses* v. *United States,* 166 U. S. 571-586, 41 L. Ed. 1119, 17 Sup. Ct. 682.

This power to contract, which is an incident of the sovereignty of the United States and is, as stated by Judge Marshall co-extensive with the duties and powers of government, carries with it complete exemption of the government from all obligation to comply with State registry laws, for the reason that it would grievously retard, impede and burden the sovereign right of the government to subject it to the operation of such laws. *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 22 L. Ed. 80; *Stanley* v. *Schwalby,* 147 U. S. 508, 37 L. Ed. 259, 13 Sup. Ct. 418; *United States* v. *Snyder,* 149 U. S. 210, 37 L. Ed. 705, 13 Sup. Ct. 846.

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If the States had the power to interfere with the operations of the Federal government by compelling compliance on its part with State laws, such as the registry statutes, then, in the language of the Supreme Court, the potential existence of the government would be at the mercy of State legislation. *United States* v. *Snyder, supra,* 214.

Both the Supreme Court of the United States and this court have recognized these liens asserted by the United States against the "Mohawk" and the "Galveston" as valid contractual liens. As such they are superior to the claims of all creditors of the Trigg Company not having prior liens since, as seen, they are not affected by the fact that the contracts reserving them were not recorded; the United States being under no obligation to comply with the State registry laws.

The decree complained of must be reversed, and the cause remanded for further proceedings not in conflict with this opinion.

ON REHEARING.

HARRISON, J., delivered the opinion of the court.

This petition for rehearing was granted solely for the purpose of having further argument upon the question, whether or not the present controversy between the Federal government and the general creditors of the Wm. R. Trigg Co. with respect to the vessels "Mohawk" and "Galveston," had been previously decided adversely to the government and in favor of the general creditors, and was, therefore, as to this appeal *res judicata.*

This court by its opinion rendered on the 13th day of June, 1912, held that this question was not *res judicata.* In the opinion then handed down we said: "An examination of the record and the opinion of this court on the former appeal in the case of *Hawes & Co.* v. *Trigg Co.,*

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supra, shows very clearly that the question now raised between the United States and the general creditors of the Trigg Company was not considered or intended to be dealt with at that time. The only questions then under consideration were those dealt with in determining the controversy between the supply lien creditors of the Trigg Company and the United States."

The present argument, which has been given due consideration, has confirmed us in the conclusion that neither the opinion of this court in *Hawes & Co.* v. *Trigg Co.,* 110 Va. 165, 65 S. E. 538, nor that of the Supreme Court in *United States* v. *Ansonia Brass and Copper Co.,* 218 U. S. 452, 31 Sup. Ct. 49, 54 L. Ed. 1107, decided or intended to decide any question between the United States and the general creditors of the Wm. R. Trigg Co. The rights of such general creditors were not in issue in the case of *Hawes & Co.* v. *Trigg Co., supra,* were not presented on that appeal, were not necessarily involved therein and were in no way considered or affected by that decision, or by the decision, affirming the same, of the Supreme Court in *U. S.* v. *Brass & Copper Co., supra.* The questions involved in the present appeal have been fully dealt with in the opinion of this court handed down June 13, 1912, and the decree then pronounced by this court must, for the reasons there given, be adhered to.

Reversed.

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VIRGINIA BEACH DEVELOPMENT COMPANY v. COMMONWEALTH.

June 12, 1913.

1. INJUNCTIONS—*Action on Bond—Liability of Obligors—Case at Bar—Damages Recoverable—Failure to Give Additional Bond.*—The liability of the obligors in an injunction bond is determined by the bond alone. In the case at bar, the condition of the bond, following the language of the statute, was "to pay all such costs as may be awarded against the party obtaining the injunction and all such damages as may be incurred in case the injunction shall be dissolved." The injunction was dissolved and the suit dismissed, for failure to give an additional bond, before this action was brought. The order for the additional bond was made pending a hearing of a motion to dissolve upon the merits of the case, after evidence had been taken, and as a condition of granting a motion of the defendant to give opportunity for taking further evidence.

   Held: In these circumstances the obligors in the injunction bond cannot escape liability to the plaintiffs on the theory that the injunction was dissolved because the new bond was not given, and not because the injunction was erroneously awarded.

2. INJUNCTION—*Action on Bond—Damages Recoverable—Case at Bar.* Damages recoverable in an action for breach of the condition of an injunction bond must be such as are the natural and proximate result of the issuance of the writ. In the case at bar, the damages awarded are not excessive, but are such as the evidence warranted.

Error to a judgment of the Circuit Court of the city of Norfolk in an action of debt. Judgment for the plaintiffs. Defendants assign error.

Affirmed.

The opinion states the case.

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Loyall, Taylor & White, for the plaintiffs in error.

J. Edward Cole, for the defendants in error.

CARDWELL, J., delivered the opinion of the court.

In the chancery cause of Virginia Beach Development Company against Meta D. Matthews and others, the plaintiff, on the 17th day of May, 1902, obtained from Hon. R. R. Prentis, judge of the circuit court of Princess Anne county, an injunction restraining and prohibiting said defendants from erecting on the premises of the said Meta D. Matthews, at Virginia Beach, in the county of Princess Anne, described as lot 10 and half of 9, in square 11, etc., any building to be used as a public bath house, or for any other purpose than as an out-house to the residence theretofore erected on the said premises, and from using any building on the said premises for any other purpose than as a residence or boarding house, until the further order of the court. The injunction was conditioned upon the plaintiff entering into and acknowledging a bond with good security in the clerk's office of the circuit court of Princess Anne county, before the clerk of said court, in the penalty of $1,500, "conditioned to pay all such costs as may be awarded against the complainant and all such damages as may be incurred, in case the injunction herein mentioned shall be dissolved." Pursuant to the order of the judge of the circuit court awarding the injunction, the complainant, Virginia Beach Development Company, as principal, and N. Beaman, as surety, executed the required injunction bond in the penalty of $1,500, conditioned as required in the order awarding the injunction, and in conformity with the terms of the statute, *infra,* in such cases made and provided.

Subsequently, in the same chancery cause, a decree was

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entered on May 21, 1903, directing that "unless a new injunction bond in the penalty of $3,000.00 should be given by the Virginia Beach Development Company within five days, the said preliminary injunction should stand dissolved." The said bond for the $3,000 was not given, and, on the 5th day of March, 1907, a decree was entered in the cause dismissing it at the complainants' costs, on the ground that the injunction issued therein stood dissolved by the decree of May 21, 1903, the complainant not having given the additional bond for $3,000 required of it within five days from the date of said decree.

At the rules held for the circuit court of the city of Norfolk, in the clerk's office thereof, on the first Monday in September, 1908, the Commonwealth of Virginia, at the relation of L. D. Yarrell, administrator of the estate of Metta D. Matthews, deceased, and Augustus Matthews, instituted this suit against the Virginia Beach Development Company and N. Beaman to recover costs and damages to the amount of $1,500 alleged to have been incurred to the said Metta D. Matthews and Augustus Matthews by reason of the suing out by the defendant, the Virginia Beach Development Company, of the said injunction in the above named chancery cause which was dissolved as aforesaid.

The case was twice tried before a jury, in the first of which trials the jury found for the plaintiffs and assessed their damages at $1,200 (no provision for interest being made in the verdict), and the court placed the plaintiffs on terms to accept a judgment for $450, or else submit to a new trial; and, the plaintiffs declining to remit a part of the recovery, the verdict was set aside and a second trial ordered.

In the second trial, had on May 6, 1912, the defendants demurred to the evidence, and, subject to the decision of the court on the demurrer, the jury brought in a verdict

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assessing plaintiffs' damages at $951,67, with interest from the 26th of May, 1903, which verdict the defendants moved the court to set aside, on the ground that the damages it allowed were excessive, but the court overruling the demurrer to the evidence, overruled also the motion to set aside the verdict of the jury, and entered judgment thereon, to which judgment this writ of error was awarded.

There are two questions presented: First, on the demurrer to the evidence, whether the court should not have sustained the demurrer, on the ground that no cause of action had been shown by the plaintiffs (defendants in error here), as the injunction had been dissolved, not because it was erroneously awarded, but only because the Virginia Beach Development Company had not given the required new bond; second, whether the damages assessed by the jury, subject to the demurrer to the evidence, are excessive?

With respect to the first question presented, plaintiffs in error contend that in order to recover damages resulting from the granting of an injunction, it must be alleged and proven by the plaintiff, in an action on the injunction bond, not only that the injunction has been dissolved, but that it was erroneously awarded.

The bond sued on in this instance is in the very terms of our statute, section 3442 of the Code of 1904, which provides that the conditions of an injunction bond shall be "to pay all such costs as may be awarded againsts the party obtaining the injunction, and all such damages as may be incurred in case the injunction shall be dissolved" . .

It is well settled by the decisions of this court, that the liability of the obligors in such a bond is determined by the bond alone. *Blankenship* v. *Ely,* 98 Va. 359, 36 S. E. 484; *Columbia Amusement Co.* v. *Pine Beach Co.,* 109 Va. 325, 63 S. E. 1002, 16 Ann. Cas. 1120, and authorities cited.

In the last named case it was held that a plaintiff who

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has executed an injunction bond, and has obtained and acted upon the injunction is estopped to deny his liability upon the bond.

In *Clayton* v. *Anthony,* 15 Gratt. (56 Va.) 518, it was held: "Dissolution imports that damages are to be paid, unless they are expressly remitted by the terms of the order."

The opinion of this court in *Hubble* v. *Cole,* 88 Va. 236, 13 S. E. 441, 13 L. R. A. 311, 29 Am. St. Rep. 716, cited for plaintiffs in error, says: "The defendant was undoubtedly bound by her deed, and if, without sufficient cause (and the dissolution and the dismissal of the bill is conclusive of that) the defendant deprived the plaintiff of the benefit and profits accruing to him thereunder, she should undoubtedly respond in damages."

Several cases have been cited as supporting plaintiffs in error's contention here that before the obligors in an injunction bond can be required to respond in damages to the obligee in the bond, it must first be determined that the injunction was erroneously awarded, but those cases were ruled by a statute different from ours, notably the case of *Palmer* v. *Foley,* 71 N. Y. 106, in which the decision of the court was based upon the statute of New York—section 22 of the Code—providing that the condition of the undertaking in an injunction bond should be that the plaintiff will pay to the defendant such damages, not exceeding an amount which is specified, as the defendant may sustain by reason of the injunction, if the court should finally decide that the plaintiff was not entitled thereto.

The difference in the condition of injunction bonds is discussed at some length in *Jessie Branch Piano Co.* v. *Porter,* 134 Ala. 302, 32 Southern Rep. 678, 92 Am. St. Rep. 31, where the opinion says: "The bond is the contract of the party executing it: the statute prescribes its

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terms and conditions; and the right of action arises immediately upon the breach of its conditions. The promise is to pay all damages and costs if the injunction is dissolved. The failure to pay all damages and costs sustained by the suing out of the writ, after the same has been dissolved, is a breach of the bond, and there is nothing in the statute nor in the bond which postpones the right of action until after a final decree on the merits. There are cases to be found which hold that there can be no assessment of damages for suing out the writ until a final hearing of the cause in which the writ issued. We apprehend that these cases, however, are based upon a statute different from ours, or upon a bond different from the one sued on."

In *Alliance Tr. Co.* v. *Stewart,* 115 Mo. 236, 21 S. W. Rep. 793, the bond given and sued on was conditional on the payment of "all damages that may be occasioned by such injunction, and of all sums of money, damages and costs which shall be charged against it if the injunction shall be dissolved." *Held:* That "in an action on the injunction bond the defendant could not maintain that the injunction was improperly issued in the first place, and that therefore only nominal damages should be awarded against him, for the very terms of the statute and of the obligations of the bond required the payment of damages should the injunction be dissolved." See also *Gray* v. *Railroad Co.,* 162 Ala. 262, 50 So. Rep. 352; *Roach* v. *Goodman,* 9 Gratt. (50 Va.) 93; *White* v. *Clay's Ex'ors,* 7 Leigh (34 Va.) 68.

The injunction in the case at bar was dissolved and the bill upon which it was awarded dismissed before this action on the injunction bond was instituted, so that if it were true, as plaintiffs in error contend, that the injunction was dissolved and the chancery cause in which it issued dismissed, not because the injunction was errone-

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ously awarded, but only because the Virginia Beach Development Company had not given the required new bond, that fact can avail them nothing as a defense to this action. Besides, it is shown upon the face of the decree providing that unless the new injunction bond required be given within the time specified the injunction theretofore issued in the cause should stand dissolved, that the cause had been regularly matured, the depositions of witnesses taken, and also facts agreed to; that the case was then before the court for a complete hearing on the motion of the defendants in error to dissolve the injunction; and that it was after argument commenced, when counsel for plaintiffs in error asked leave to take further evidence, which was granted upon the condition expressed in the decree, that the injunction bond be enlarged to $3,000, thus unmistakably indicating that plaintiffs in error well understood that upon the record as it then stood, unless strengthened by additional proof, the injunction would be dissolved then and there upon a full hearing upon the merits of the case. In these circumstances, plaintiffs in error cannot escape liability to defendants in error in this action upon the theory that the injunction was dissolved because a new bond, required of the complainant in the chancery cause, was not given, and not because the injunction was erroneously awarded; and, therefore, the trial court did not err in overruling the demurrer to the evidence.

Are the damages assessed by the jury excessive?

"Damages recoverable in action for breach of an injunction bond must be such as are the natural and proximate result of the issuance of the writ." *Jessie F. Piano Co.* v. *Porter, supra.*

The declaration in this case alleges that by reason of the issuance of the injunction the plaintiffs incurred the payment of costs amounting to $101.67; that the bath house, which was partially constructed, had to be left

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out a roof, and the lumber for the same, being exposed
e weather, commenced to rot and was damaged to
xtent of $400; that the plaintiffs lost entirely the
of $200, expended for labor, and also, by reason of
aid injunction were compelled to erect a stable else-
e, at a cost of $50; and also lost the rent upon said
ings and premises, amounting to the sum of $1,500.
is injunction was in force fully one year, and at the
of this cause the court, without objection on the part
aintiffs in error, instructed the jury as follows:
o. 1. The court instructs the jury, in finding dam-
in this case, they may take into consideration the
in the injunction suit, the rental value of the bath
e in question, as shown by the evidence, from the time
aid injunction was awarded on May 17, 1902, to the
the same was dissolved on May 26, 1903, and any
ioration, if any, that may be proved by the evidence
e property during the existence of said injunction,
ided the sum shall not exceed $1,500, with interest
the day of the breach of the conditions of said bond.
o. 2. The court instructs the jury that the burden
oving damages is on the plaintiffs, and the jury can
find such damages as are proved by the evidence;
must not guess, but must base their findings upon
evidence introduced in the case."

e verdict of the jury was, as stated, for $951.67, with
est from May 26, 1903, and when the amount of the
in the injunction suit, $101.67 (which was not dis-
d), is deducted, the verdict allowed only the sum of
as the rental value of the bath house in question
the time the injunction was awarded to the time it
dissolved, and for the deterioration of the property
ng the existence of the injunction.

ere was evidence tending to prove loss to defendants
rror by reason of damage to the bath house, left only

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partly constructed, and the amount expended in labor which was totally lost, as alleged in their declaration; so that the verdict of the jury does not cover the rental value of the property, as contended for by plaintiffs in error. But be that as it may, W. J. O'Keefe, a totally disinterested witness examined on behalf of defendants in error, and who had lived on the beach for twenty years, had rented and used similar property to that here the subject of litigation, and was familiar with the condition and value of this specific property in 1902 and 1903, when asked as to his experience and familiarity with beach property and the rental value thereof, and the value of concessions, and what was a fair rental value for the "Matthews bath house," as located, in 1902 and 1903, answered: "In 1902, with the amusements and everything adjoining this bath house, I really thought a thousand dollars would have been a proper value for it, because it had one of the best locations on the beach, because of the moving of the pavillion to the old hotel, and the excursions around it—the excursionists were around this property and the bath house on the ground had a big advantage over one further away, adjoining the amusement end of it. That is my experience with bath houses, and I have run them."

This witness further stated that the candy stand, as located on this property and used by its owners afterwards and intended to be used when injoined, had an annual rental value of $175. There is other testimony in the record corroborating that given by the witness O'Keefe.

Upon the whole case, we are of opinion that the judgment of the circuit court is without error, and, therefore, it is affirmed.

Affirmed.

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Read

Wythevil

VIRGINIA RAILWAY AND POW

June 12, 191

Absent, Cardwell, J.

1. LIMITATION OF ACTIONS—*Burden of Proof.*—The burden is on the pleader of the statute of limitations to make out a case to which the statute clearly applies.
2. NUISANCE—*Continuous—Occasional—Pleading.*—Under a declaration alleging a continuous nuisance, the plaintiff may recover for occasional nuisances if the occasional nuisances were caused in the manner alleged in the declaration.
3. APPEAL AND ERROR—*Inconsistent Positions—Entire Damages—Successive Actions—Estoppel.*—Where the record shows that a case was conducted throughout in the lower court on the theory that only such damages could be recovered as had been suffered prior to the institution of the suit, and the evidence has been confined to such prior damages at the instance of the defendant, this is an admission of the right and necessity for future actions for subsequent injuries, and the defendant is estopped to deny in this court that the case belongs to that class where the plaintiff is entitled to maintain successive actions for the damage he may from time to time suffer. He cannot assume in this court a position inconsistent with that taken by him in the trial court.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Robert B. Tunstall and *Henry W. Anderson,* for the plaintiff in error.

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Braxton & Eggleston, Thomas W. Shelton and *Claude M. Bain,* for the defendant in error.

HARRISON, J., delivered the opinion of the court.

It appears that the Virginia Railway and Power Company maintains and operates a large electric plant erected by it in a residential part of the city of Norfolk, for the purpose of supplying electric power for its street railway and for general municipal lighting. The plaintiff, G. Benson Ferebee, alleges that he has been greatly damaged in the useful and comfortable enjoyment of his home by reason of the wrongful and negligent operation of this power plant by the defendant, and he brings this action to recover for such injuries.

The defendant company relied alone upon the plea of the statute of limitations and demurred to the evidence of the plaintiff. The lower court overruled the demurrer to the evidence and gave judgment in favor of the plaintiff for the damages ascertained by the jury. To that judgment this writ of error was awarded.

As stated in the petition, the sole question to be determined by this court is whether the plaintiff's cause of action accrued within five years next prior to the bringing of this suit, on the 22d day of April, 1912.

The burden was upon the defendant company to sustain its plea of the statute of limitations. As said in *Goodell* v. *Gibbons,* 91 Va. 608, 612, 22 S. E. 504, 505, "It behooves the pleader of the statute to make out a case to which it clearly applies."

It cannot be denied that if this case belongs to that class where repeated actions may be brought, the plaintiff would have a right to recover for the injury sustained for the five years next preceding the date of the action, and the statute of limitations would have no application.

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chief discussion has, therefore, been directed to the
tion, whether this case belongs to the class mentioned,
o that class where but one action can be brought, in
h a recovery must be had for the entire damage suf-
l, both past and future, in which case the action will
arred unless brought within five years from the time
cause of action arose.

ne record shows that this case was conducted through-
in the lower court upon the theory that only such
age could be recovered as had been suffered prior to
institution of the suit. This theory admits the right
necessity for future actions for injuries subsequently
rring.

is contended by the defendant company that the dec-
tion was drawn upon the theory that permanent dam-
might be recovered, and that it will not support a re-
ry for recurring damages. The language of the decla-
on, taken as a whole, does not justify this contention,
if the declaration alleged a continuous nuisance it
d not prevent a recovery thereunder for an occasional
ance.

Cohen v. *Bellenot,* 2 Va. Dec. 639, 32 S. E. 455, 457,
court says: "We know of no good reason nor of any
of law which would prevent a plaintiff from recover-
for occasional nuisances, under a declaration alleging
ntinuous nuisance, if the occasional nuisances were
ed in the manner alleged in the declaration."

the case at bar, whether the nuisance was continuous
casional, it was caused in the manner alleged in the
ration. If this was a suit, as contended, to recover
re as well as present damages, then the plaintiff was
led to introduce evidence to show the permanent in-
s he had sustained, and yet when evidence to that
t was offered by the plaintiff it was promptly objected
y counsel for defendant as inadmissible. This view

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was acquiesced in by counsel for the plaintiff, and the evidence was confined to the damages suffered prior to the institution of the action. After the evidence was all in, the court instructed the jury, at the instance of the plaintiff, to which instruction there was no objection, that no damages could be assessed for the plaintiff "unless the same were suffered within five years prior to the institution of this suit." This instruction was in line with the defendant's objection to the introduction of any evidence of damage sustained after the suit was instituted and would have been wholly erroneous if the contention now made was sound, that the suit was for entire damages, past, present and future.

In *C. & O. Ry. Co.* v. *Rison,* 99 Va. 18, 31, 37 S. E. 320, 324, this court said: "A party is forbidden to assume successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other and mutually contradictory."

In view of the theory of the case adopted by both parties in the lower court, and of the evidence adduced, viewed from the standpoint of a demurrer to the evidence, we are of opinion that the defendant company is estopped to deny, in this court, that the case belongs to that class where the plaintiff is entitled to maintain successive actions for the damage he may from time to time suffer. The evidence having been confined, at the instance of the defendant, to showing only the damage sustained by the plaintiff for the five years prior to his action, and the jury having been instructed, without objection, to confine their ascertainment of damage to that period, it would be an injustice to the plaintiff for this court now to hold that the action was for permanent injuries, and, therefore, that the plaintiff's recovery was for all damages, past, present and future, growing out of the defendant's wrongful and negligent operation of its electric power plant.

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The plaintiff's recovery not being for permanent injuries, but limited only to such damage as he had sustained within five years prior to the institution of his suit, the statute of limitations did not bar his claim.

The evidence was amply sufficient to warrant the verdict of the jury, and the judgment complained of must, therefore, be affirmed.

Affirmed.

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Wytheville

WARDELL v. BIRDSONG AND OTHERS.

June 12, 1913.

Absent, Keith, P.

1. EQUITY—*Rescission—Mutual Mistake—Sale of Land in Gross—Contracts of Hazard.*—Where the mistake in the quantity of land sold is so gross as to amount to a fraud upon the purchaser, he should not be required to abide by his contract, if executory, and, if executed, a court of equity has the power to and should relieve him of the consequences of the mistake by rescinding the contract *in toto*, provided always the parties thereto can be put in *statu quo* and the rights of innocent third persons have not intervened. It is not necessary that there should have been intentional or wilful fraud and deceit. Thus where a vendor honestly believed and represented a tract of land to contain about two hundred acres, when in fact it contained only ninety-four and one-half acres, the sale will be set aside, although the deed contains a clause that "it is understood this land is sold by the lump and not by the acre."
2. EQUITY—*Contracts of Hazard—Sale of Land in Gross—Presumption.*—Contracts of hazard as to the quantity of land in a designated boundary are not discountenanced when they are clearly established and their terms are fair and reasonable, but courts of equity do not regard them with favor. The presumption is against them, and this presumption can only be overcome, if at all, by clear and cogent proof. Where parties contract for the payment of a gross sum for a tract or parcel of land, the presumtion is that the quantity influences the price to be paid, and that the agreement is not one of hazard.

Appeal from a decree of the Circuit Court of Sussex county. Decree for the defendants. Complainant appeals.

Reversed.

The opinion states the case.

Thomas H. Howerton and *Wm. B. Cocke*, for the appellant.

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. *H. Mann,* for the appellees.

ARDWELL, J., delivered the opinion of the court.

. L. Birdsong, on July 2, 1904, conveyed to B. R. Bird- by the general description, "a tract or parcel of land Sussex county containing 700 acres, more or less, and ins the land of E. C. Land and R. L. Dobie and rs," which deed, though absolute on its face, was in ity a mortgage given to secure certain indebtedness he said M. L. Birdsong to B. R. Birdsong, E. T. Bird- and F. J. Birdsong, and whereby said M. L. Bird- remained the owner of the property conveyed, sub- to the said mortgage. A certain portion of this tract 00 acres of land was separated from the main body he tract by a county road, and this separate portion he land was, by all concerned, supposed to contain t 200 acres.

n December 1, 1907, M. L. Birdsong agreed to sell and ey unto John G. Hawley "200 acres of land, more ss, lying, being and situate in . . . magisterial dis- , Sussex county, Virginia, bounded by the lands of Lumber Company, the main run on Assamosic np and the main county road leading from Waverly to ex county court-house," at the purchase price of 50, but with a provision for abatement if the acreage below 185 acres, and providing for a subdivision and ey, if desired, of which purchase price Hawley paid , and the contract was to run for one year, with a t to declare it forfeited after that year, which right not exercised.

short while before March 11, 1909, A. J. Wardell, had theretofore resided in the State of Ohio, came to town of Waverly, Sussex county, where he met Haw- who was doing business in said town as a real estate

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agent, and, with Hawley, Wardell looked at certain lands, including the tract supposed to contain 200 acres just mentioned, the boundaries of which they went partially over, with the view of a sale thereof to Wardell; and on March 11, 1909, Hawley and Wardell entered into an option contract, giving to Wardell the right to purchase, within a stated time, certain lands which Hawley had for sale, including the so-called 200 acre tract. By the terms of this option contract Wardell had the right to purchase said 200 acre tract "at $1,700.00, if taken in lump, or eleven ($11) dollars per acre, whatever the number of acres are shown to be by a careful survey thereof, the party of the second part (Wardell) to have the option of choosing whether by lump or by the acre at the time of closing the deal finally." At the time of the making of the option contract Hawley showed to Wardell his contract with the said M. L. Birdsong for the purchase of said land. Wardell returned to his home in Ohio, and, after the 20th of March, 1909, on which date his option contract expired, he came back to Waverly and indicated his intention to purchase the "200 acre tract," to which declared intention Hawley replied that the right to purchase this land had been forfeited, as the time had expired, but said that he would not be mean about it and would arrange with Mr. Birdsong for the deed, which was necessary by reason of the fact that the title to the land was still outstanding in B. R. Birdsong's heirs by virtue of the said deed intended as a mortgage, and for the further reason of the nonpayment by Hawley of the balance of the purchase price for the land due to M. L. Birdsong. Hawley furnished Wardell with what purported to be an abstract of title to the 200 acres, but was, in fact, an abstract of title to the 700 acre tract, which included the 200 acre parcel, mostly in undergrowth and small trees, the lines of which were but partially pointed out to Wardell by Hawley; and in

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neantime Wardell had asked both Hawley and M. L. song, separately, about the number of acres in the of land that he was proposing to buy as his future , and each of them expressed the belief that the tract ined about 200 acres. Just before and at the time eed from the widow and heirs of B. R. Birdsong, of April 1, 1909, conveying to Wardell and his wife the tract of 200 acres, was being written, Hawley asked lell whether he would take said land by the lump or e acre, to which Wardell replied that he would take the lump, as he had intended to do so from the first. deed, when finally executed and delivered, described nd conveyed as containing 200 acres, more or less, lso stated "and it is understood this land is being by the lump and not by the acre." Settlement was for the land by Wardell and wife with Hawley by g $1,500 in cash and executing their note for the ce of the purchase money, $200, secured by trust on the land, the money and the note being re- l by M. L. Birdsong. Later, to-wit, on April 909, Wardell had the land surveyed by a com- t surveyor, who reported that the tract con- l but 94½ acres, and that there was a difference of a cres in the real boundaries thereof, and the bounda- ointed out by Hawley to Wardell prior to the option act, and upon which space between the lines, as in- ed by the survey and as pointed out by Hawley to ell, the latter had built a modest dwelling.

on the fact of such difference in the boundaries be- rought to the attention of Hawley, he immediately ased sufficient land from the Gray Lumber Company, wners of the adjoining lands, to make lines accord the boundaries pointed out by him to Wardell, and rded a deed for this additional land—five and one- acres—to Wardell on June 26, 1909, which deed was

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retained by the latter, as he claims, simply as an evidence that a mistake had been made.

On the 30th day of August following, Wardell and wife filed their bill in this cause, making Hawley, M. L. Birdsong and the widow and heirs of B. R. Birdsong, deceased, parties defendant thereto, and alleging that the land in question was purchased by complainants, relying on the statements and representations of Hawley and M. L. Birdsong that it contained about 200 acres, and on the recital in the deed of conveyance of the land to complainants that the tract contained 200 acres, more or less, and that if they had not believed said statements and representations to be true, they would never have purchased the said land; that they never purchased this tract of land as a contract of hazard, but believing it contained about 200 acres; that the widow and heirs of B. R. Birdsong, deceased, made a mistake in conveying said land, intending to convey 200 acres, when, in fact, the conveyance was of only 94½ acres, and that there was a material mistake made by the grantors in said deed and the complainants in selling and buying said tract of land. The bill then charges that the statements and representations made by Hawley and M. L. Birdsong that the tract of land contained 200 acres were false and were made to deceive and induce the complainants to purchase said tract of land for 200 acres, when they knew that the tract did not contain that number of acres, or anything like that amount of land. The prayer of the bill, in substance, is that the said option contract with Hawley and said deed from B. R. Birdsong's widow and heirs to complainants be rescinded and declared null and void; that the purchase money paid by complainants for the said land be refunded to them, with interest; that the deed of trust and note for the deferred payment be cancelled, and that damages be awarded complainants for building the house on the land of the Gray Lumber Company, etc.

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e defendants demurred to and answered the said bill, g the ground in their answer that no false statements presentations had been made inducing complainants y the land in question; that complainants understood the deed for the land to them was to be a contract of rd; that while Hawley did state to complainants that ought the land for 200 acres conditionally, and be- l it did contain 200 acres, as old surveys in the neigh- ood generally overran, and did furnish Wardell an act of the 700 acres of land, which purported to be stract of 200 acres, and did make a mistake in repre- ng its boundary lines, he, Hawley, never stated that ract contained 200 acres as a matter of fact, and no ke had been made in conveying land as 200 acres to lainants, as it was intended that the conveyance ld be for the land irrespective of the number of acres ntained. While M. L. Birdsong denies that he falsely sented the number of acres in the tract or attempted islead the complainants, he admits that, upon being l by Wardell as to the number of acres, he "told him he thought or reckoned it contained 200 acres."

on the hearing of the cause on the pleadings and depo- ns of witnesses taken and filed by the respective es, the court overruled the demurrer to the bill and notion to strike out certain portions of the deposition id A. J. Wardell, but was of opinion that the com- ants had purchased the land in question under a con- of hazard and were, therefore, not entitled to the re- rayed for in their bill, and accordingly dismissed the with costs, to the defendants; and from the decree e court so ruling the complainant, A. J. Wardell, sur- of himself and his wife, obtained this appeal.

e material facts in the case are practically undis- l, and, when analyzed, they very clearly show that the llant, who was a stranger in Sussex county when, in

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search of a tract of land in Virginia for his future home, he met appellees, Hawley and M. L. Birdsong, who had for sale the tract of land in question, and that they informed him what the tract contained, and that it always had been understood as containing 200 acres; that Hawley, when told by appellant that he was in search of a small farm, said: "I have a nice little 200 acre farm that is my own property, which I have purchased to make myself a home, and if it were not that I have to raise a little money, you or no other man could purchase it"; that M. L. Birdsong, in selling the land to Hawley, believed, as did Hawley, that it contained 200 acres, "with slight variations in surveyors' instruments, to cover which a clause was found in all deeds"; that appellant relied on the statements of Hawley and M. L. Birdsong that the land contained 200 acres and agreed to purchase it, believing that the tract contained 200 acres, except to the extent that the number of acres might vary because of "any slight variations in surveyors' instruments"; and that the land intended to be sold, and which was conveyed to appellant, instead of containing 200 acres, or approximately that number of acres, contained but 94½ acres.

It further appears, as is conceded in the argument, that Hawley and M. L. Birdsong not only believed the property in question contained 200 acres, more or less, but that M. L. Birdsong had derived the property from his father, who always thought there were 200 acres in the tract, and on one occasion sold it for 200 acres; and that "the entire Birdsong family always thought that the field contained two hundred acres, and referred to it as the two hundred acre field."

The sole question, therefore, presented on this appeal is whether or not a court of equity, under the circumstances narrated, has the power and ought to decree the relief prayed in the bill of complaint.

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would seem to us shocking to the conscience of a court quity to hold that a purchaser of a parcel of land and conveyed to him as 200 acres, more or less, when ıct the acreage is but 94½, should be required to keep pay the purchase money for the land, although the rs of the land, as well as the buyer, believed there e in the tract conveyed about 200 acres, and although conveyance also contains the clause "and it is under- l this land is sold by the lump and not by the acre." re is no pretense made in the case that appellees have prejudiced or even inconvenienced by delay on the of appellant in the institution of this suit to have transaction cancelled and annulled and the purchase ey paid by him refunded by appellees.

ıe authorities are not to the effect that the mistake ıch a case shall be the result of intentional or wilful d and deceit in order that the party wronged or in- l by the mistake may be relieved from the strict terms is otherwise binding contract, but that where the mis- complained of is so gross as to amount to a fraud ı the injured party's rights, he should not be required bide by his contract, if executory, and, if executed, urt of equity has the power to and should relieve him ıe consequences of the wrong-doing or mistake by re- ling the contract *in toto,* provided, always, that the ies thereto may be put in *statu quo,* and the rights of cent third parties have not intervened.

ı *Lee* v. *Laprade,* 106 Va. 594, 56 S. E. 719, 117 Am. St. 1021, 10 Ann. Cas. 303, the opinion of this court, ing from 4 Min. Inst. 697, says: "In cases of plain ake or misapprehension, though not the effect of fraud ontrivance, equity will rescind the conveyance, if the r goes essentially to the substance of the contract, so the purchaser does not get what he bargained for, or vendor sells that which he did not design to sell."

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"Thus, if A buys land of B, to which B is supposed to have a good title, and it turns out, in consequence of facts unknown alike to both parties, he has no title at all, equity will cancel the transaction and cause the purchase money to be restored to A, putting both parties in *statu quo.*" 4 Min. Inst., *supra,* at p. 700.

Contracts of hazard, such as we are here considering, have not been discountenanced by the courts when they have been clearly established and are fair and reasonable, but courts of equity do not regard them with favor, the presumption being against them, which presumption is to be overcome, if at all and effectually, by clear and cogent proof; and where the parties contract for the payment of a gross sum for a tract or parcel of land, upon an estimate of a given quantity, the presumption is that the quantity influences the price to be paid and that the agreement is not one of hazard. *Blessing's Admr.* v. *Beaty,* 1 Rob. (40 Va.) 304, in which case the court held that the appellant was entitled to compensation for the deficiency of 34½ acres in a tract of 503 acres, on the ground of mutual mistake.

The case just cited and other cases are referred to in *Boschen* v. *Jurgens,* 92 Va. 756, 24 S. E. 390, as affirming the rule of law stated above, and in the opinion by Keith, P., in speaking of the discrepancy in the depth of a town lot contracted for as being 138 feet, when, in fact, it was only 129 feet deep, says: "It seems to us that the appellant is in this dilemma: either her testator made the representation as to the quantity in the honest belief of the truth of what he said, in which case the court should grant the relief prayed for on the ground of mutual mistake of the parties as to the material term in their contract, or that he made the representation as to quantity, knowing or having reason to know that it was untrue, in which case appellee's claim for relief would rest upon even stronger

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ds. In justice, however, to the vendor, Mr. Boschen, st be said that there is nothing in this record to sup- the suspicion that he contemplated or perpetrated ," and the relief prayed was decreed.

Belknap v. *Sealey,* 14 N. Y. 143, 67 Am. Dec. 120, ing a contract for the sale of a tract of land in by reference as to quantity to a deed describing the as containing "about nine acres, be the same, more s," from which one acre and six perches had been out which proved to contain only about half as much presented, and which was mainly valuable for divi- nd sale as city lots, and its value, therefore, being ely in proportion to quantity, the court said in its n: "A deed which describes the land and states the er of acres, although with the words 'more or less,' y imports that there is not a great deficiency or ex- If the deficiency is one-half, the instrument carries face a gross misrepresentation. And it is quite ma- to observe that such words do not import a special ement that the purchaser takes the risk of the quan- Their presence in the contract or deed may render re difficult to prove such a mistake as will justify terference of equity, but they are not equivalent to ulation that the mistake, when ascertained, shall not ound of relief."

held in the opinion of this court in *Boschen* v. *Jur- supra,* though the seller of land made a false repre- ion as to quantity in the honest belief of the truth at he said, yet a court of equity should grant the re- ayed on the ground of mutual mistake as to the ma- terms of the contract between the parties. See also v. *Odone,* 91 Ga. 600, 18 S. E. 355.

the case at bar the mistake of the parties selling the as to the number of acres it contained was so gross amount to, and in all respects to be the equivalent

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of, a fraud upon the rights of appellant; and this appears from the undisputed facts in the case as well as from the preponderance of the evidence; and, therefore, the mutual mistake charged has been established, and it is to be presumed that quantity influenced the price paid for the land, which presumption has not been overcome by any fact or facts proved; and the very brief delay in ascertaining the deficiency in the land being satisfactorily accounted for, we are of opinion that the circuit court erred in denying the relief prayed in appellant's bill.

The decree appealed from is reversed, and the cause remanded for further proceedings therein not in conflict with the views expressed in this opinion.

Reversed.

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Syllabus.

Wytheville

HITE V. AMERICAN NATIONAL LIFE INSURANCE CO.

June 12, 1913.

MURRER TO EVIDENCE—*Concessions—Waiver.*—Upon a demurrer to the evidence, the demurrant admits the truth of the demurree's evidence and all just inferences that a jury might properly draw therefrom, and waives all of his own evidence in conflict with that of the demurree, and all inferences from his own evidence, although not in conflict with the demurree's evidence, which do not necessarily result therefrom.

AUD—*Waiver—Knowledge of Rights—Burden of Proof.*—A plaintiff who admits fraud in the procurement of the contract in suit and relies upon a waiver of the fraud by the defendant has the burden of proof to show by clear evidence that the defendant, after the fraud became known to him, waived the same and ratified the contract. The waiver must be distinctly made, with full knowledge of the rights intended to be waived. The fact that a party knows his rights and intends to waive them must plainly appear.

AUD—*Misrepresentation—Materiality.*—The representation by an agent for the sale of stock in a corporation that his principal will at any time, upon request, repurchase the stock of any stockholder who may choose to dispose of the same, is a material representation and sufficient, if untrue, to avoid the contract.

INCIPAL AND AGENT—*Agency—Continuance—Presumption.*—An agency once established will be presumed to continue, in the absence of evidence to the contrary.

AUD—*Acquiesence—Laches—Estoppel—Mere Delay.*—Mere delay will not estop a purchaser of stock from interposing the defense that the contract was procured by the fraud of the seller's agent, where the rights of third persons have not intervened, and the position of the seller has not been injuriously affected by the delay. Acquiescence or affirmance does not bind the purchaser if induced by a reasonable expectation on his part that the fraud will be remedied.

AUD—*Affirmance—Attending Meeting of Stockholders.*—Giving a proxy to represent a stockholder at a meeting of stockholders does not operate as a waiver of the stockholder's right to rescind the contract for fraud in its procurement where the meeting was only a few days after the subscription was made, and long before the fraud was discovered.

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Error to a judgment of the Circuit Court of Mathews county in a proceeding by way of motion for a judgment for money. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Buford, Lewis & Peterson and *J. Boyd Sears,* for the plaintiff in error.

Fred Harper, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This is a motion by the American National Life Insurance Company (hereinafter designated as the plaintiff) against C. C. White (hereinafter designated as the defendant) to recover the amount of two promissory notes evidencing the deferred instalments of the purchase price for seventy-five shares of the plaintiff's stock, sold by its agent to the defendant.

The defendant by special pleas of set off, under Va. Code, 1904, sec. 3299, interposed the defense that he had been induced to purchase the stock by certain false and fraudulent representations made to him by the plaintiff's agent; that consequently he was entitled to a rescission of the contract and to recover back the cash payments made by him on the stock, and also to be relieved from liability on the notes upon which this motion was brought.

The plaintiff demurred to the defendant's evidence, and to the ruling of the court sustaining the demurrer to the evidence and rendering judgment against the defendant for the sum demanded, this writ of error was awarded.

The allegation that the defendant was induced to buy the stock by false representations is admitted. Adopting

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anguage of the brief of the plaintiff's counsel, "the before the court presents this simple, concrete ques- *Did the defendant below, who had been induced by alse representations of the plaintiff's agents to enter a contract for the purchase of . . . the stock, e the fraud after its discovery by him and, by his con-, estop himself from interposing that fraud as a de- e to an action upon the contract?"*

ne foregoing question is to be considered and answered ght of the familiar and oft-repeated rule applicable to murrer to the evidence, namely: that the demurrant its the truth of the demuree's evidence, and all just rences that a jury might properly draw therefrom, and es all of its own evidence in conflict with that of the uree; and all inferences from its own evidence, al- gh not in conflict with the demurree's evidence, which ot necessarily result therefrom. And, moreover, the len of proof rests upon the plaintiff to show by clear ence that the defendant, after the fraud became known im, waived the same and ratified the contract. *Vir- a Land Company* v. *Haupt,* 90 Va. 533, 19 S. E. 168, m. St. Rep. 939; *Wilson* v. *Carpenter,* 91 Va. 183, 21 . 243, 50 Am. St. Rep. 824; *West End Company* v. *borne,* 97 Va. 734, 34 S. E. 900.

n *Cumberland Coal, &c., Co.* v. *Sherman,* 20 Md. 117, 150, the court says: "Confirmation according to the s must be a solemn and deliberate act . . . and ticularly where the original transaction was infected n fraud, the confirmation of it is so inconsistent with ice, and so likely to be accompanied with imposition the courts watch it with the utmost strictness, and ot allow it to stand but on the clearest evidence."

n *Wilson* v. *Carpenter, supra,* at page 192, the court s: "No man can be bound by a waiver of his rights, un- such waiver is distinctly made, with full knowledge of

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the rights which he intends to waive, and the fact that he knows his rights, and intends to waive them, must plainly appear." Citing *Montague's Admr.* v. *Mossey,* 76 Va. 307.

In the light of these well settled principles, we shall briefly review the salient facts in relation to this transaction.

In December, 1907, the defendant subscribed to fifty shares of the stock, and in January following bought the remaining twenty-five shares, making the cash payments and giving his two promissory notes for the deferred instalments of the purchase money. At the time of the sale and as an inducement to the defendant to buy, Kulp, the agent of the plaintiff, represented that his principle would at any time upon request repurchase the stock of any stockholder who might choose to dispose of the same.

In the fall of 1908, the defendant, having heard rumors affecting the financial condition of the company, addressed a letter of inquiry to the president on that subject, and likewise offering his stock for sale in accordance with the promissory representation of the agent. The president replying to that letter did not repudiate the agent's representation, nor did he in terms decline to repurchase the stock for the company, but said: "Personally, I am loaded up with all that I can carry, and cannot at this time purchase any more." At a still later date the defendant had a conversation with the secretary of the plaintiff, by long distance telephone, and was informed by him that the company would not pay a dividend for the year 1908, as promised by Kulp. In January, 1909, the defendant, who resided in Mathews county, in company with a fellow-countyman, Dr. Vaden, who had also bought stock of Kulp, went to Lynchburg to attend the annual stockholders' meeting. However, though present, he did not vote or participate otherwise in the proceedings; but his investigations convinced him of the falsity of the original representations

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he agent which induced him to subscribe to the stock. straightway, in company with Dr. Vaden, sought out lp and they both insisted that he redeem the promise le by him on behalf of the company to repurchase their k. In response to this demand, Kulp agreed that he ld either place their stock elsewhere or take it off their ds. In point of fact he kept faith with Dr. Vaden, and company adjusted the matter to his satisfaction; but, n respect to the defendant, the plaintiff ultimately re- iated Kulp's agreement to repurchase the stock on the nd that at that time he had ceased to be its agent, and representing the defendant. There was no evidence o the termination of the agency, and the relation hav- been once established, it will be presumed to have con- ed in the absence of proof to the contrary. 19 Am. ng. Ency. L. (1st ed.) 75-c; 31 Cyc. 1305; 4 Wigmore Ev., sec. 2530.

n April, 1909, the defendant wrote to the secretary and ed his attention to the representations of the agent ch had involved him in the transaction, and on August 1909, he wrote a letter of earnest supplication to Kulp, rming him of his inability longer to carry the burden beseeching him to fulfil his promises; and, finally, r persistently, but in vain, seeking relief in accordance the stipulations of his agreement with the agent, on 14, 1910, he caused a letter to be addressed to the ntiff, denying all liability on account of his stock sub- ption.

rom the discovery of the fraud by the defendant until inal abandonment of the contract, the relations of the ies had remained in *statu quo*. No further payments been made by the defendant on the subscription, and ividend or other benefit had been received by him from plaintiff, and neither the rights of creditors nor of any r innocent third party had intervened, nor had the tion of the plaintiff itself been injuriously affected by

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the delay. It thus appears that the delay of the defendant in rescinding the contract after discovering the fraud was the result of a reasonable expectation on his part that the plaintiff would live up to the repeated assurances of its agent and grant him the relief to which he was entitled. In these circumstances mere delay will not estop a purchaser from interposing the defense that the contract was procured by fraud.

"Acquiescence or affirmance does not bind the stockholder, if induced by a reasonable expectation on his part that the fraud would be remedied." 1 Cook on Corporations, p. 435, sec. 161, citing *West End Land Co.* v. *Claiborne,* 97 Va. 734, 34 S. E. 900.

In *Grosh* v. *Ivanhoe, &c., Co.,* 95 Va. 171, 27 S. E. 844, it is said: "Whether a party seeking a rescission of his contract has forfeited his right to it by laches or misconduct depends upon the facts or circumstances of the particular case. If the rights of creditors have intervened, or an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, a party seeking rescission of his contract on the ground of fraud will be deemed to have waived his right to rescind (*Martin* v. *South Salem, &c., Co.,* 94 Va. 28, 26 S. E. 591; Add. on Conts. 772; *Hurt* v. *Miller,* 95 Va., page 32, 27 S. E. 831); but there is nothing of the sort in this case. It is admitted that the defendant company has no creditors to be affected by a rescission of the contract; no effort is made to show that the defendant company could have resold the lots had the appellant repudiated his contract sooner."

The fact that the defendant gave the president of the company a proxy to represent him in a meeting of the stockholders is also relied on as evidence of ratification of the contract. The meeting referred to was in January, 1908, only a few days after the subscription by the defen-

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o the first block of stock, and, of course, long before aud was discovered. In such case, giving the proxy ot operate as a waiver of his right to rescind the con- for fraud. *Va. Land Co.* v. *Haupt,* 90 Va. 533, 19 168, 44 Am. St. Rep. 939.

conclusion, we are of opinion that the evidence does ow a ratification of the contract by the defendant or acquiescence therein as should estop him from relying the defense that the contract was procured by the ulent representations of the plaintiff's agent.

these reasons the judgment of the circuit court must versed, and this court will enter such judgment as ial court ought to have rendered, overruling the de- er to the evidence and awarding the plaintiff in error amages provisionally assessed by the jury.

Reversed.

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Staunton

ARMOUR AND COMPANY v. COMMONWEALTH.

September 11, 1913.

1. TAXATION—*Doing Business Without License—Dispute as to Amount.* A conviction of a merchant for doing business without a license will not be set aside when no license was in fact taken out because of a difference of opinion between the merchant and the commissioner of the revenue as to the proper basis for estimating the amount payable for the license. However that question may be settled, it still remains that he was doing business without the license required by law.

Application for a writ of error to a judgment of the Corporation Court of the city of Danville, affirming the judgment of a justice of the peace imposing a fine for doing business without a license.

Refused.

The opinion states the case.

Hall & Woods, for the petitioners.

BY THE COURT.

A warrant was issued against Armour and Company for doing business in the city of Danville as merchants without having first obtained a license, as provided by law. Upon a hearing the justice found Armour and Company guilty and assessed against them a fine, and from this judgment an appeal was taken to the corporation court for the city of Danville, where the judgment was affirmed; and Armour and Company thereupon applied to this court for a writ of error.

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e contention of the plaintiff in error is that the com-
oner of the revenue proceeded upon a wrong basis in
ating the amount payable for a merchandise license
s case; that its Danville house disposes of merchan-
ot manufactured by it, the purchase price of which
ess than $1,000; while upon the part of the Common-
h it was contended that the sale value of the articles
oy plaintiff in error, and upon which the amount
license was to be estimated, was as much as $30,000.
the view we take of the case, the inquiry into the
nt properly payable by Armour and Company in order
ure a license, and the basis upon which the estimate as
amount due to the Commonwealth for a license was
made, are wholly immaterial. However that question
e decided, it remains that Armour and Company were
business as merchants in the city of Danville with-
aving first obtained a license from the proper authori-
f the State of Virginia to conduct such business. We
erefore of opinion that the judgment of the Corpora-
Court of Danville is plainly right, and that the writ
or should be refused and the judgment complained
rmed.

Refused.

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Staunton

BRANHAM v. ARTRIP.

September 11, 1913.

Absent, Keith, P.

1. EQUITY JURISDICTION—*Complete Relief—When Refused—More Adequate Remedy at Law.*—Where the specific purpose for which a suit in equity was brought has failed, in whole or in part, a court of equity will not in all cases go on to decree against any party to it. If the remedy at law is more appropriate than in equity, or the verdict of a jury is proper for the determination of the controversy, the jurisdiction in equity will be declined.
2. IMPROVEMENTS—*Code, Section 2760—When Not Applicable.*—Section 2760 of the Code, allowing a defendant, under the conditions mentioned in that section, to file a petition to be allowed for improvements put upon land, while holding the same under a title believed by him to be good, applies only to actions of ejectment or to cases in which a decree or judgment is rendered against a defendant for land. The case in judgment is not an action of ejectment, but a suit in chancery, for the specific enforcement of an alleged parol contract, and no decree has been rendered therein against the defendant for land, and hence the statute does not apply.

Appeal from a decree of the Circuit Court of Dickenson county. Decree in part for the defendant. Complainant appeals.

Reversed.

The opinion states the case.

Sutherland & Sutherland, for the appellant.

Skeen & Skeen and *Vicars & Peery,* for the appellee.

HARRISON, J., delivered the opinion of the court.

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appellant instituted an action of ejectment to re-
f the appellee the possession of a certain lot of land
enson county. Appellee thereupon filed the bill in
se praying that appellant be enjoined from prose-
his action at law, and praying for the specific per-
ce of an oral contract alleged in the bill. The
court refused to specifically enforce the contract
, because it was too indefinite and uncertain, but
a decree directing that possession be delivered to
pellant upon the terms that he should pay appellee
lue of the improvements he had put upon the land
e rental value of the same. From that decree this
was taken.

are of opinion that the grounds necessary to justify
ecific performance of the alleged contract were
wanting in the case, and that the circuit court
ly refused to enforce it. We are, however, further of
n that when the court reached that conclusion it
have dismissed the bill, leaving the parties to their
ies, if any, at law.

s not every case in which a court of equity acquires
iction of a cause for a specific purpose that it may,
thstanding that purpose has failed in whole or in
go on to decree against any party before it. So far
it, when the remedy at law is more appropriate than
uity, or where the verdict of a jury is proper, the
iction will be declined. *Walters* v. *Farmers Bank,*
. 12.

e case of *Robertson* v. *Hogshead,* 3 Leigh (30 Va.)
vas one where the bill filed was for the rescission of
tract. The court, having held that the plaintiff was
ntitled to a rescission of the contract, was asked to go
d ascertain the damages he had sustained by reason
e alleged fraud in the procurement of the contract.
the court declined to do, and on appeal Judge Tucker,

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speaking for this court, said: "A bill for damages will not lie in equity. The court could only ascertain those damages by sending the case to a court of law. To that, therefore, the party should apply, instead of clogging the litigation by a suit in equity, which could only end where he ought to have begun."

In the case before us the appellant denies that he ever entered into any parol agreement for the sale of the land in question. The appellee having no title is asking for the ascertainment of unliquidated damages for improvements claimed to have been put upon the land by him. The alleged parol contract is uncertain and indefinite and the whole evidence adduced on the subject utterly conflicting and unsatisfactory. It is, therefore, a case, as was said in *Walters* v. *Farmers Bank, supra,* where the remedy at law is more appropriate than in equity, and the verdict of a jury necessary for its proper determination.

The appellee, to sustain the jurisdiction of a court of equity to go on and ascertain the damages to which he is entitled in this case for improvements alleged to have been put upon the land, relies upon section 2760 of the Code of 1904, which is as follows:

"Any defendant against whom a decree or judgment shall be rendered for land, where no assessment of damages has been made under the preceding chapter, may at any time before the execution of the decree or judgment, present a petition to the court rendering such decree or judgment, stating that he, or those under whom he claims, while holding the premises under a title believed by him or them to be good, have made permanent improvements thereon, and praying that he may be allowed for the same over and above the value of the use and occupation of such land; and thereupon the court may, if satisfied of the probable truth of the allegation, suspend the execution of the judgment or decree, and impanel a jury to assess the damages

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plaintiff and the allowances to the defendant for mprovements."

as been repeatedly held that the statute relied on s only to actions of ejectment or to cases in which a or judgment is rendered against a defendant for *Graeme* v. *Cullen,* 23 Gratt. (64 Va.) 266; *Woods bbs,* 33 Gratt. (74 Va.) 685; *Effinger* v. *Hall,* 81 Va. *lanary* v. *Kane,* 102 Va. 547, 558, 46 S. E. 312, 681. ase at bar is not an ejectment suit but a chancery or the specific enforcement of an alleged parol con- and no decree has been rendered therein against *efendant* for land.

the foregoing reasons, this court will reverse the e appealed from and will enter such decree as the court should have entered, dismissing appellee's bill costs, without prejudice, however, to his right to pro- in a court of law to enforce such rights as he may have.

Reversed.

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Staunton

HONAKER v. SHRADER.

September 11, 1913.

Absent, Keith, P., and Whittle, J.

1. APPEAL AND ERROR—*Verdict—Conflict of Evidence.*—Where the evidence is conflicting on a question of fact submitted to a jury, their verdict will not be disturbed on appeal.
2. EVIDENCE—*Boundaries—Oral Testimony.*—Oral evidence is always admissible as to location and boundary, and hence testimony as to the contents of a lost title bond may be received for the purpose of throwing light upon the true location of a disputed boundary line.
3. EVIDENCE—*Improper Reception—Harmless Error.*—The reception of improper evidence as to the location of a boundary line is harmless error where the land in dispute is clearly identified and located by other evidence in the case.
4. EJECTMENT—*Excessive Verdict—Putting Party on Terms.*—The practice of putting a party on terms, where the verdict is plainly erroneous in part, is a wise and salutary one, saving delay, costs and, above all, ending litigation, and is as applicable to an action of ejectment as to any other action.

Error to a judgment of the Circuit Court of Bland county in an action of ejectment. Judgment for the defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Williams & Williams and *A. R. Porterfield,* for the plaintiff in error.

Jackson & Henson and *Williams & Farrier,* for the defendant in error.

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RRISON, J., delivered the opinion of the court.

e plaintiff's declaration in this action of ejectment
ins two counts. The first describes the land alleged
withheld as his entire tract containing one thousand
. The second count describes the land in controversy
venty-nine acres, more or less, lying on the south side
ıckhorn mountain, on Wolf creek, in Bland county.
eal question involved in the controversy, as shown by
ecord, was the correct location, on the ground, of the
rn line of the plaintiff's land; plaintiff contending
its correct location was at one place, while the de-
ınt insisted that it was at another. Upon this ques-
the evidence was conflicting. The jury have estab-
l the true line to be as contended for by the defendant,
ıpon well settled principles the verdict must stand,
s some other valid objection can be shown thereto.
rton v. *Roberson,* 110 Va. 136, 65 S. E. 835.
e objection made by the plaintiff to the evidence of-
by the defendant as to the execution and contents
lost title bond executed by Chapman & French to
n D. Lambert, about the year 1853, for land adjoin-
he plaintiff's eastern line, was properly overruled.
ence of this title bond and its contents was not in-
ced, as contended by the plaintiff, for the purpose
tablishing the defendant's title to the land in con-
rsy, but merely as evidence tending to throw light
the true location of the eastern boundary line, and
its true location was where the defendant claimed it
. The court, in admitting this evidence, both at the
of its admission, and subsequently by instructions,
ed the same to the light, if any, it threw on the ques-
of boundary involved. Oral evidence is always ad-
ble as to location and boundary, and it would seem to
ear that evidence of the contents of a lost title bond

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was admissible for the same purpose. *Austin* v. *Minor,* 107 Va. 101, 57 S. E. 609; *Schaubuch* v. *Dillemuth,* 108 Va. 86, 60 S. E. 745; *Edmunds* v. *Barrow,* 112 Va. 330, 71 S. E. 544.

The plaintiff also complains of the ruling of the court in permitting an old survey, bearing on the question involved, to be introduced by the defendant. No sufficient reason for rejecting this evidence is suggested, but even if it had been error to admit the survey mentioned, it was plainly without prejudice to the plaintiff, as the land described therein was clearly identified and located by other evidence in the case.

Several other objections to the ruling of the court upon the admission of evidence are raised, but upon examination they are found to be wholly without merit and, therefore, need not be adverted to in detail.

In the petition for a writ of error no complaint is made of the action of the court in refusing certain instructions asked for by the plaintiff, but it is contended that the verdict of the jury was not in accord with the instructions given, and the assertion is made that, in the instructions given for the plaintiff, the jury are told that the title deeds under which the plaintiff claimed covered the land in controversy and that he was entitled to recover the same. The instructions do not bear this interpretation. Whether the plaintiff's title papers covered the land in controversy depended upon the true location of his eastern line. This was a question of fact for the jury and no instructions given by the court trenched upon the province of the jury to settle that question.

As to the instructions given by the court for the defendant, no error is pointed out, the plaintiff contenting himself with the general observation that they are erroneous and misleading. An inspection of these instructions shows them to be free from reasonable objection. They

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dy views of the law applicable to the case which have long settled by the decisions of this court, and are ex-ed in language which could not be misunderstood.

already seen, the plaintiff's declaration was in two s, one for the recovery of his whole tract of land con-ng one thousand acres, and the other for the recovery e small tract actually in controversy. When the case given to the jury they returned a general verdict for efendant on the issue joined. After the jury was dis-ed the plaintiff moved the court to set aside the ver-upon the ground, among others, that the effect of the al verdict was to give the defendant the whole tract e thousand acres. Thereupon, the court of its own n required the defendant to enter of record a re-of that portion of the land outside of the small tract was the subject of dispute, and overruled the motion new trial. This action of the court is assigned as it being contended that the court had no power to ne defendant upon terms in a case like this.

e whole controversy in this case was as to the small of land described in the second count of the declara-The ownership of this land depended upon the cor-ocation on the ground of the plaintiff's eastern line, efendant claiming no part of the land except the small to which the true location of the eastern line entitled The real issue in this case was understood from the ning to the end of the trial by the court, the jury and rties concerned, and no reason is perceived why the to avoid the possibility of future controversy, should ave required the defendant to release of record all to the land outside of the small tract that the ver-of the jury had decided he was entitled to. *Fry* v. *ers,* 98 Va. 417, 36 S. E. 482; *Tolley* v. *Pease* (W. 78 S. E. 111.

the ejectment case of *Fry* v. *Stowers, supra,* this court

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said: "We do not approve the rule announced in *Shiflet* v. *Dowell,* 90 Va. 745, 19 S. E. 848, that the principle stated does not apply in the case of an action of ejectment, because of the statute which requires that the verdict shall 'specify the land particularly as the same is proved and with the same certainty of description as is required in the declaration.' The practice of putting a party upon terms where the verdict is plainly erroneous in part is a wise and salutary one, saving delay, costs and, above all, ending strife, and we perceive no good reason why the ends of justice are not as much subserved by the application of the principle in an action of ejectment as in any other case."

Upon the whole case, we find no error prejudicial to the plaintiff, and the judgment complained of must be affirmed.

Affirmed.

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Staunton

LEFTWICH AND OTHERS v. EARLY.

September 11, 1913.

Absent, Keith, P., and Whittle, J.

EEDS—*Delivery—Parol Evidence.*—The rule that parol evidence is inadmissible to show that a deed perfect on its face was delivered to the grantee therein on condition has no application where the question is whether there was such a complete and perfect delivery by the grantor to the grantee as to vest a perfect and indefeasible title in the latter. This is a question of fact to be determined by the circumstances of the case, and cannot, in the majority of instances, be declared as a matter of law.

EEDS—*Delivery—Necessity Of.*—Formal delivery of a deed is not essential to its validity if there be acts evidencing an intention to deliver, but an essential requisite to a good deed is that it be delivered by the grantor himself or his attorney, and the deed takes effect only from such a delivery.

EEDS—*Delivery—Intention—Evidence.*—The delivery of a deed is essential to its validity. The fact of delivery is one of intention which must be manifested by some express act of the grantor, or by acts, words or conduct manifesting an intention to deliver, and, by such act of delivery, the grantor must intend to lose control or dominion over the deed, and that it shall pass title at the same time to the grantee.

IDENCE—*Lost Deed—Proof Required.*—In suits to set up a muniment of title by parol evidence courts of equity require strong and convincing proof of the former existence of the evidence of such title, its loss and its contents.

EEDS—*Delivery to Stranger—Declaration of Use.*—While a deed may be delivered not only to the grantee himself, but to a stranger for his use, or declared to be delivered although the grantee be absent, yet, if delivered to stranger, without any declaration or other matter to show that it is for the use of the grantee, it is not a sufficient delivery.

ppeal from a decree of the Circuit Court of Grayson ty. Decree for the defendant. Complainants appeal.

Affirmed.

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The opinion states the case.

J. S. Bourne and *H. A. Cox,* for the appellants.

J. M. Parsons and *R. L. Kirby,* for the appellee.

CARDWELL, J., delivered the opinion of the court.

Josephine Willets was seized and possessed of a certain tract or parcel of land lying in Grayson county, Virginia, containing eighty acres, more or less, which she acquired by conveyance of date August 25, 1881, and being so seized of said tract of land, the said Josephine Willets, in the year 1893, intermarried with N. C. Leftwich, and N. C. Leftwich departed this life some time in the year 1905 intestate, leaving the said Josephine, his widow, and the following heirs at law surviving him: Celia Leftwich, his mother, Joseph Leftwich, and C. E. Leftwich, brothers of the whole blood, and Charlotte Evans, a sister of the half blood. The said Josephine Leftwich afterwards intermarried with one Don Early, and at the first rules held in the clerk's office of Grayson county circuit court, February, 1907, Celia Leftwich, mother, and Joseph Leftwich and Charlotte Evans, brother and sister, of the said N. C. Leftwich deceased, filed their bill in this cause against the said Josephine Early, the purpose of the bill being to have partition of the said tract of eighty acres of land between the plaintiff and the defendant, the bill alleging that some time in the year 1895, the defendant, while the wife of the said N. C. Leftwich, conveyed to him one-half undivided interest in said tract of land in fee simple with general warranty of title; that said N. C. Leftwich died intestate seized and possessed of said one-half undivided interest in said tract of land, and that complainants were unable to file the deed or copy thereof conveying to him this undivided interest in the land, as an exhibit with their bill,

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se the deed was never admitted to record and has the death of the said N. C. Leftwich been destroyed widow, the defendant, without the consent of his at law, or either of them. The bill also sought ion of one-half an acre of land, alleged to have been by the said N. C. Leftwich at his death, but this of land is not involved in this controversy.

said Josephine Early filed her answer to said bill, ch she admitted the ownership of said tract of eighty of land alleged in the bill, and also her marriage to id N. C. Leftwich, and that after his death she in- rried with said Don Early, but denied emphatically he ever at any time conveyed to her said husband, the N. C. Leftwich, a one-half undivided interest in said of land or any interest therein except as in her an- stated. Her answer then avers: "That at the time marriage to the said N. C. Leftwich he did not own nd; that they commenced and continued to live and ouse on the said eighty acres of land until his death; his land was her sole and separate property; that were no living children born to her of her marriage he said N. C. Leftwich; that she was devoted to him elt that in case of her death during his life that he be turned out of a home; that he had become at- l to her, and after frequent conversations with him on bject she decided to give him some showing on the luring his life time, and from the date of her death to te of his death." Her answer further avers: "That having reached this conclusion, she advised her said nd of her said decision and intention and he caused a g to be prepared, which was afterwards signed by nd by the terms of which he took a life estate in one- f said land in the event of his outliving her; that it nderstood and agreed between them that this paper never be worth anything to him unless he outlived

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her, and for this reason it was also agreed that it should not take effect, or be delivered to him, except at her death and in the event she died before he died." She further avers: "That from the day the said paper was signed and acknowledged by her until her said husband's death, and long after, it remained in her possession; that it being the understanding between them that it was to be of no effect unless he outlived her, and that in case of his death before her it would be destroyed, and feeling that the paper had served its purpose and that henceforth it was worthless, she paid no attention to it, and for aught she now remembers she may have destroyed it along with other of her said husband's papers; but be this as it may she is unable to find the same." Said defendant further says: "That this was the only interest or claim her said husband ever had to the said tract of land, in any way, and that this was not considered by her or her said husband as giving him any interest in the said land until her death, leaving him living, and that it was their intention in the execution of the said paper simply to protect him against the contingency of her dying first." The answer further states that she, the defendant, paid out a large sum of money for her said husband during his last illness and that the claims asserted by complainants are neither legal nor equitable, etc.

Upon the hearing of the cause on the pleadings and depositions of witnesses examined for both complainants and defendant the circuit court being of opinion "that there has not been shown such delivery of the deed in controversy alleged to have been made by defendant, Josephine Leftwich, now Josie Early, to N. C. Leftwich for one-half undivided interest in and to the eighty acre tract of land mentioned and described in the bill as the law requires, and without such delivery said deed, even if made, is invalid and that it did not pass title to N. C. Leftwich" adjudged and decreed that the complainants have no interest

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said eighty acres of land, and that as to this tract of the bill be dismissed with costs to the defendant. said decree Celia Leftwich and her co-complainants ned this appeal.

lecision of the case turns upon whether there was delivery of the deed in question as was necessary to n the grantee, N. C. Leftwich, a perfect and indefeasi-tle to one-half undivided interest in and to the said of land.

e contention of appellee throughout, and which was ined by the circuit court, is, not that the deed in ques-vas delivered on condition, but that it was never de-d at all, and that it was never to be delivered or possession of by the grantee therein until after the of the grantor, leaving the grantee surviving her, and even then it only conveyed to him a one-half interest e eighty acre tract of land for and during his life.

e authorities are uniform in holding that parol evi-is admissible to prove that a deed, perfect on its was delivered to the grantee on condition, but this does not control in a case where the question is ner there was such complete and perfect delivery of the from the grantor to the grantee as to vest in the latter fect and indefeasible title to land or an interest there-hich is a question of fact to be determined by the nstances of the case, and cannot, in the majority of nces, be declared as a matter of law.

ormal delivery is not essential if there be acts evi-ng an intention to deliver, but an essential requisite good deed is that it be delivered by the grantor him-or his attorney, and the deed takes effect only from n delivery." 2 Min. Inst. (4 Ed.) p. 731, and authori-here cited.

e date of a deed is *prima facie* the date of delivery, nly *prima facie*. *Ferguson* v. *Bond*, 39 W. Va. 561,

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20 S. E. 591; *Harman* v. *Oberdorfer,* 33 Gratt. (74 Va.) 497; *Raines* v. *Walker,* 77 Va. 92; *Hardy* v. *Norfolk Mfg. Co.,* 80 Va. 404.

"The question of the delivery of a deed is one of intention, and the delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed." *Martin* v. *Flaherty,* 13 Mont. 96, 32 Pac. 287, 19 L. R. A. 242; 40 Am. St. Rep. 415.

In the case just cited, the opinion quotes from 1 Dev. on Deeds, sec. 262, as follows: "As no particular form of delivery is required, the question whether there was a delivery of the deed or not, so as to pass title, must in a great measure, where it is not clear that an actual delivery has been effected, depend upon the peculiar circumstances of each particular case. The question of delivery is one of intention, and the rule is that a delivery is complete when there is an intention on the part of the grantor to make the instrument his deed. The main thing which the law looks at is, whether the grantor indicates his will that the instrument should pass into the possession of the grantee; and, if that will is manifest, then the conveyance inures as a valid grant, although, as above stated, the deed never comes into the hands of the grantee. A deed does not become operative until it is delivered with the intent that it shall become effectual as a conveyance. Whether such intent actually existed is a question of fact to be determined by the circumstances of the particular case." 2 Min. Inst. *supra; Tyler* v. *Hall,* 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 337.

In the last named case it was held that "a deed left by the grantor in a place where it is accessible to the grantee does not constitute a delivery in the absence of an intention on the part of the grantor to deliver and of the grantee to accept . . . So long as the delivery of a deed remains incomplete, a grantor can change his intent, and destroy the deed if he so desires."

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Shuffert v. *Crote,* 88 Mich. 650, 50 N. W. 657, 26 Am. Rep. 316, the opinion of the court says: "Evidence ving that a conveyance of land was signed, acknowld, witnessed and handed to grantee, who was a son he grantor, to whom the deed was immediately reed; that the father said that he calculated to deed the erty to his son, so that there would be no trouble after leath, but that he would not like to see it go on record is life-time; and the son replied, he need not be afraid s going on record, and that he (the father) could keep mself—does not show a delivery of the deed; and if grantor subsequently destroyed it and conveyed the e property to another person in consideration of ser- performed and to be performed, the latter acquired itle."

Parrott v. *Avery,* 159 Mass. 594, 35 N. E. 94, 22 L. R. 53, 38 Am. St. Rep. 465, the Supreme Court of Massaetts held, "That a deed is not delivered though it is uted in the presence of a witness, if there is no declaraon the part of the grantor that he intends it to take t at once, and he retains it in his possession during ife-time putting it in a chest and bequeathed the chest ne grantee." *Stone* v. *French,* 37 Kan. 145, 14 Pac. 1 Am. St. Rep. 237.

ne authorities cited, to which many more might be d if deemed necessary, hold that the delivery of a deed sential to its validity; that the fact of delivery is one of ntion must be manifested by some express act of the tor, or by acts, words or conduct manifesting an inon to deliver, and that by such act of delivery the tor must lose control or dominion over the deed in tion; and that it is his intention that it should pass at the time and that he (grantor) should lose conover it.

ne deed in question in *Tyler* v. *Hall, supra,* under

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which the defendant claimed title from his father, the original source of title, was found by the administrator of the father in a desk kept by him prior to his death and under his control, among other papers belonging to him at his death, and was afterwards given into the defendant's (grantee) possession by the administrator of the grantor. Held, that the burden of proving that the deed was delivered before the father's death was on the defendant.

The suit out of which this appeal arises is in effect a suit to set up by parol evidence a muniment of title to land, and in such cases courts of equity require strong and convincing proof of the former existence of such title, its loss, and its contents.

This court held in *Barley* v. *Byrd,* 95 Va. 317, 28 S. E. 329, that "courts of equity, in exercising their jurisdiction to set up a lost instrument which is to constitute a muniment of title require strong and conclusive proofs of its former existence, its loss and its contents."

It appears from the record that appellee and her husband, N. C. Leftwich, were unlettered, ignorant negroes; the husband being impecunious, while the wife owned the land conveyed to her as above stated, and was economical and thereby enabled to do much more for the comfort of her husband in health, as well as in sickness, than he was ever able to provide for himself. They were married in 1893 and the deed here in question was signed and acknowledged by her in 1895, as she frankly admits, but was never delivered, nor was it to be delivered unless her husband survived her, in which event it was then and only then to be recorded, whereby he would own and control a one-half undivided interest in her land during his life, so that he might not be dispossessed of a home during his life. There is no proof that the husband, N. C. Leftwich, ever in his lifetime asserted title to any part of this land, or denied the ownership or control thereof in his wife. The

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(appellee) states fully in her answer in this cause the
re of the transaction under review, and in her depo-
n, taken in her own behalf, the statements she makes
ot only entirely consistent with those made in her an-
, but are consistent with the circumstances surround-
er and her said husband during their married life.
e only disinterested witness introduced by appellants
e evidence at all tends to prove a delivery of said deed
in the meaning of the law is one M. L. Vaughan, who is
n of some prominence in the county in which the ap-
e and her husband, N. C. Leftwich, resided during the
d from the date of their marriage till the death of the
and; but Vaughan was not positive as to the material
with respect to which he undertook to testify, and, in
not only are the statements made by him contradicted
roof of other facts and circumstances, testified to by
rs, but when the testimony given by him is read as a
le he appears to have a slippery memory, and has to
it that he was mistaken as to the material facts with
ect to which he had undertaken to testify.
ot only did N. C. Leftwich in his life-time never assert
gal claim to an interest in the land of his wife, but no
has testified in this case that he ever was financially
to pay $600, the amount that Vaughan states was the
sideration named in the deed in question, "as well as
ould remember," and there is no other evidence than
of Vaughan contradictory of the statement of appellee
he effect that the deed only stated a nominal con-
ration.
very witness called on behalf of appellants, except said
L. Vaughan, was a close relative of N. C. Leftwich, de-
sed, and directly interested in the result of this litiga-
. Much of the evidence given by these witnesses is
lly irrelevant to the issue, consisting largely of loose
versations with N. C. Leftwich not in the presence of

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appellee, or with the latter after the former's death, which in no way committed her to any concession helpful to the appellants in this cause, while the statements of other of these witnesses are either discredited or flatly contradicted by facts proven.

P. A. Reavis, a witness fifty-two years of age, a farmer, and who had known N. C. Leftwich from the time he was a small boy; T. E. Brannock, deputy clerk of the circuit court of Grayson county, a deputy treasurer and tax collector of the county in 1904; and Wilson Blair, also a prominent farmer—all totally disinterested witnesses, say in substance that not only did N. C. Leftwich never assert title to an interest in the land in controversy, but disclaimed any interest in his wife's land, and all along and within a short time of his death denied that he owned any land.

Appellee testified that in the year 1894 or 1895 she executed and acknowledged "what they called a deed, and that their agreement at the time was, that if I would make him these papers in case I died first, that he was to hold an interest in the place his life-time, and in case he died first the papers were to be destroyed and to be no more account. I to hold the paper in my possession until the death of one or the other of us. He was to have what remained at my death his life-time. It was agreed for me to hold it (the deed) in my possession, and if I died first it was to be delivered to him and it was to go on record, and if he died first it was to be destroyed. After his death I destroyed all the Leftwichs' papers and I suppose it was destroyed with them. It was in my possession from the time it was acknowledged until the time it was destroyed, except one time when I handed it to J. M. Parsons. He came to my house and sent Norvell (her husband) in after the paper, and I would not send it. He, Parsons, came in and explained to me why he wanted it. He said that he thought

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ould use it to advantage in railroad election in count- the vote. He wanted to see if he could. He receipted for the paper and promised to return it when he was ugh and did so. He sent it to me by mail. I do not w M. L. Vaughan. He never received the paper from me never passed my house and returned this deed." Ap- ee denies positively the statements made by the wit- es for appellants as to conversations with her husband reference to said deed or her land, alleged to have n place in her presence; in fact, she denies practically y statement made by appellants' witnesses except the that she made the deed to her husband in pursuance he agreement and understanding stated by her in her ver and in her examination as a witness, and that she royed it in pursuance of this understanding, and de- that she ever delivered the deed to her husband for any pose. She asserts positively that it was never out of possession or control except on the occasion when at request of J. M. Parsons she let him take it away with understanding that he would return it to her, which lid. It is not pretended that appellee understood the pose for which Parsons wanted the deed or intended he loan of it to him to confer any benefit upon the ntee, N. C. Leftwich.

he weight of the evidence is decidely to the effect that lants' leading witness, Vaughan, never saw the deed eason of its having been delivered to him by appellee . C. Leftwich for any purpose, and the contention, were ade, that appellee, an ignorant negro woman, by com- ng with the request of Parsons in the manner she did, nded that the deed should pass title, at the time, and she should lose control over it, could not be main- ed. Whilst a deed may be delivered, not only to the ntee himself, but to a stranger for his use, or declared e delivered although the grantee be absent, yet if de-

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livered to a stranger, without any declaration or other matter to show that it is for the use of the grantee, it is not a sufficient delivery. 2 Min. Inst. p. 732.

It also appears from the proof in this case that when N. C. Leftwich incurred any debt it was paid by his wife (appellee), and therefore there was no conceivable reason why he should not have had this deed recorded and the land it purported to convey transferred to himself and claimed it, or some interest in it, as his own, except for the fact that, as appellee claims, the deed was never delivered to him, and was to be of no force or effect unless she died before he did, in which event he was to have only an undivided one-half interest in the land for his life.

This is not a controversy between creditors of N. C. Leftwich, deceased, and appellee touching the right of the former to subject the land in question to the payment of debts asserted against Leftwich, but a case in which a court of equity is asked by the next of kin and heirs at law of the decedent to take the title of appellee's land from her and give it to them, and that, too, upon proof that is of itself not only unsatisfactory and therefore not conclusive, but is contradicted or discredited throughout by positive evidence, borne out by the circumstances clearly shown to have surrounded the parties to the transaction in question.

The decree appealed from is, in our opinion, not only in accordance with the right and justice of the cause, but is fully justified by the evidence in the record, and, therefore, it is affirmed.

Affirmed.

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Syllabus.

Staunton

K CONSTRUCTION COMPANY v. COUNTY OF RUSSELL.

September 11, 1913.

Absent, Keith, P., and Whittle, J.

ARDS OF SUPERVISORS—*Disallowance of Claim—Appeal—Pleadings in Court.*—Sections 838, 843 and 844 of the Code prescribe the manner by which claims against the county may be collected, and the county cannot be sued in any other manner; and while the method prescribed for litigating the rights of the parties as to claims disallowed by the board of supervisors is called an appeal, the action of the board is in no proper sense of the term an adjudication of the claim on its merits, and upon an appeal to the circuit court from their action disallowing a claim the county may make the defense of set-off under section 3299 of the Code, or any other defense justified by the facts.

EADING—*Special Plea of Recoupment—General Issue.*—A plea which alleges that the plaintiff not only failed to keep and perform his agreement in various particulars, but that by reason of such failure the defendant was injured and damaged in excess of the amount claimed and sued for by the plaintiff sets up a good defense, and does not amount simply to the general issue.

NTRACTS—*Engineers' Estimates—Finality—Case at Bar.*—When all of the provisions of the construction agreement in the declaration mentioned are read and considered together, it seems clear that it was not intended that the monthly estimates of the engineer should be final and conclusive of the facts recited in them, or regarded as a final acceptance of the work mentioned in them.

TOPPEL—*Conduct of Other Party—Ignorance of Facts—Fraud.*—The doctrine of estoppel *in pais* is a purely equitable one, and it is essential to its application, where a party claims to have been influenced to his prejudice by the conduct of another, that he should have been ignorant of the state of facts relied on to constitute such estoppel. Nor can one base a claim for an estoppel upon acts or conduct induced by his own fraud or false representations.

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5. CONTRACTS—*Engineers' Estimates—Finality—Directions of Engineer—Case at Bar—Instructions.*—In an action on a contract which provided that the work was to be done in accordance with the specifications and conditions of the agreement between the parties and to the satisfaction of the county of Russell and the engineer, the plaintiff asked the court to instruct the jury "that if you believe from the evidence that the plaintiff performed the work mentioned in the contract and specifications in evidence before you, according to the contract and specifications, *as directed by the engineer*, and offered the same to the defendant, through its agents and engineers, for acceptance, then you should find for the plaintiff, notwithstanding the contract provides that 'no work shall be regarded as accepted until the final acceptance of the whole work herein contracted for.'" The court modified this instruction by striking out the words italicised.

   Held: The modification was clearly proper, and the instruction as given was as favorable to the plaintiff as it was entitled to have it.

6. CONTRACTS—*Engineers' Estimates—Fraud—Mistake.*—The acts of engineers in supervising the performance of work under construction contracts are not binding upon either party when such acts have been induced by the fraud of the other party, or are the result of fraud or mistake on the part of the engineers so gross as to amount to fraud on the rights of the other party.

7. INSTRUCTIONS—*Jury Sufficiently Instructed.*—When the jury have already been fully and sufficiently instructed on a given point in a case, it is not error to refuse other instruction, though correct, on the same point.

8. VERDICTS—*Evidence to Support.*—Where the evidence in a cause is conflicting, but there is ample evidence to sustain the finding of the jury, their verdict will not be set aside.

Error to a judgment of the Circuit Court of Tazewell county on appeal from an order of the board of supervisors of Russell county. Judgment for the defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Hart & Hart, J. H. Chapman and *Finney & Wilson*, for the plaintiff in error.

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A. Routh, Henson & Bowen and *A. S. Higginbotham,* he defendant in error.

CHANAN, J., delivered the opinion of the court.

e plaintiff in error, who was the plaintiff in the trial , entered into a written agreement with the county ussell for the construction of some six miles of mac- road. When the plaintiff had performed its undertak- as it claimed, it presented to the board of supervisors at county for allowance and payment a claim for 4.38, the balance due under the contract as it claimed. board of supervisors refused to allow the claim, and its action the plaintiff appealed to the circuit court ussell county. It being agreed that there was good e for removing the cause to another circuit, it was re- d to the circuit court of Tazewell county. There was dict and judgment in that court for the defendant, a recovery in its favor for the sum of $1,060.68. To judgment this writ of error was awarded.

e first error assigned is to the action of the court per- ng the defendant to file a special plea of set-off under on 3299 of the Code.

e first ground of objection is that no such plea could ed in an appellate court.

section 844 of the Code it is provided that "no action be maintained by any person against a county, upon claim or demand, until such person shall have first nted his claim to the board of supervisors of such ty." By section 838 it is provided that when any such is presented to and disallowed by the board of super- s, the claimant may appeal within a named time; and ction 843 it is declared that such determination by oard of supervisors shall be final and conclusive and rpetual bar to any action in any court, unless an ap- be taken from such action, or unless the board shall

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consent and agree to the institution of an action by such claimant. This is the manner prescribed by law by which claims against the county may be collected, and the county cannot be sued in any other mode than that prescribed by law. *Botetourt* v. *Burger,* 86 Va. 530, 533, 10 S. E. 264.

While the method prescribed by the statute for litigating the rights of the parties as to the claim so disallowed is called an appeal, the action of the board of supervisors is in no proper sense of the term an adjudication of the claim on its merits, and even where the claim has been allowed by the board such action will not estop the county from setting up a defense to the claim when subsequently sued upon it. *Board of Supervisors* v. *Catlett's Ex'ors.* 86 Va. 152, 162-3, 9 S. E. 999, and authorities cited.

In that case it was held that the powers and duties of the board of supervisors are executive and not judicial, and that its allowance of a claim is not an adjudication and does not bar its contesting the claim's validity and pleading the statute of limitations when a mandamus is applied for to compel payment. And *a fortiori* this would be true where the claim has been disallowed.

The county had the same right to file a plea of set-off under section 3299 of the Code as it had to make any other defense which the facts justified it in making.

A further objection to the action of the court in permitting the special plea of set-off to be filed is that it does not aver fraud or any other matter which would entitle the defendant to recover over against the plaintiff, and amounts to no more than the general issue. This latter objection does not seem to be much relied on, and if it were is plainly without merit. The allegations of the plea, if true, show that the plaintiff not only failed to keep and perform its agreement in various particulars, but that by reason of such failure the defendant was injured and damaged in excess of the amount claimed and sued for by the plaintiff.

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rrors are assigned to the action of the court in giving refusing instructions, in admitting evidence, and after- ds in refusing to exclude the same and in overruling motion of the plaintiff to set aside the verdict of the because contrary to the law and the evidence. The priety of the action of the court in respect to all these gnments of error depends for the most part upon what he true meaning of the contract sued on.

he contention of the plaintiff is, and its assignments rror are based chiefly upon the view, that the monthly mates of the engineer in charge of the work were con- ive upon the parties. On the other hand the county ms that these monthly estimates are not conclusive of statements contained in them.

y the terms of the agreement between the parties and specifications which are expressly made a part of it, provided, among other things, that "payments shall nade monthly upon approximate estimates of the en- er, reserving ten *per cent.* (10 *per cent.*) of amounts until a final settlement . . . . In case any of said work done or materials provided by the party of first part shall be unsatisfactory to the said engineer, the party of the first part shall, on being notified eof by the engineer, immediately remove such unsatis- ory work or materials and replace the same with good k or materials satisfactory to said engineer," and in event the plaintiff did not do so the engineer was given right to remove such rejected work or materials at the nse of the plaintiff. It was then provided in the same se, that "no work shall be regarded as accepted until final acceptance of the whole work herein contracted It was further provided, that "to prevent all dis- s and litigation it is further agreed by the parties to that the said engineer shall decide all questions, culties and disputes of whatever nature which may

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arise relative to the construction, prosecution and fulfillment of this contract, and as to the character, quality, amount and value of any work done, material furnished under or by reason of this contract, and his estimates and decisions upon all claims, questions and disputes shall be final and conclusive upon the parties thereto."

It further provides that the plaintiff should not be "entitled to demand or receive payment for any portion of the work to be done under or by reason of the contract until all disputes, disagreements and questions between the parties hereto affecting the right to any portion of the amount claimed shall have been settled as above provided for."

There are other provisions of the contract which throw some light upon its meaning as to the question under consideration, but the provisions quoted are those chiefly relied on by the parties to sustain their respective contentions.

The agreement does not, as do many in most contracts for the construction of railways, macadam roads and the like, expressly provide that when the work is completed there shall be a final estimate, or declare in express terms what shall be the effect of the monthly estimates of the engineer; but when all the provisions of the agreement are read and considered together it seems to us clear that it was not intended that the monthly estimates should be final and conclusive of the facts recited in them, or regarded as a final acceptance of the work mentioned in them. To so hold would be to give no effect to that provision of the contract which expressly declares that "no work shall be regarded as accepted until the final acceptance of the whole work herein contracted for." What would have been the meaning and effect of the contract if that provision had not been inserted, it is unnecessary to consider. It is in the contract. Its meaning is plain and unambiguous. It shows that the parties did not intend that

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making of monthly estimates during the progress of work and payments thereon should be regarded as a and final acceptance of the work embraced in such nthly estimates, but that the work was to be accepted a whole when completed. This being so, the court did err in giving instructions numbered 1 and 5, offered the defendant, which told the jury that such monthly mates were not conclusive of the statements made ein, and did not constitute final acceptance of the work ered by such monthly estimates. Neither did the court in refusing to give instructions numbered 3, 5 and 7, red by the plaintiff, by which the court was asked to the jury, in effect, that such monthly estimates and ments thereon as provided by the contract without ob- ion were conclusive upon the parties and could not be troverted.

will be convenient here to consider the assignment of r as to the action of the court in the admission of ence.

he object of the evidence admitted over the plaintiff's ctions, and which the court refused to exclude, was to v that part of the work embraced in the monthly esti- es was not done according to the provisions of the con- t. Under the construction placed upon the contract o the effect of the monthly estimates, such evidence clearly admissible.

y instruction No. 10 offered by the plaintiff, the court asked to tell the jury that if they believed the facts othetically stated therein, the defendant was estopped n denying that such portions of the work done as were raced in the monthly estimates had not been properly tructed. Several objections are made to this instruc-

he instruction fails to take into consideration the that there was evidence tending to show not only that

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the plaintiff knew that the work embraced in the said monthly estimates was not done in accordance with the provisions of the contract, but that the plaintiff had by fraudulent practices deceived the engineer who made some of the monthly statements in the belief that such work had been properly done.

The doctrine of *estoppel in pais* is purely an equitable one, and it is essential to the application of that principle that a party claiming to have been influenced by the conduct of another to his injury was ignorant of the state of facts relied on to constitute such estoppel. *C. & O. Ry. Co.* v. *Walker,* 100 Va. 69-70, 92-93, 40 S. E. 633, 914, and authorities cited. And still less can he base a claim for an estoppel upon the acts or conduct which were induced by his own acts, and *a fortiori* on those induced by his own fraud or false representations. See *Jones* v. *Bond,* 86 Va. 81, 9 S. E. 503. Note to *Williamson* v. *Jones,* 4 Am. & Eng. Dec. in Eq., pp. 265-6, and cases cited; 16 Cyc. 747 and cases cited.

It is unnecessary to consider the other objections urged to instruction No. 10 since the objection already considered shows that the court did not err in refusing to give it.

Instruction No. 6, offered by the plaintiff, was as follows: "The court instructs the jury that if you believe from the evidence that the plaintiff performed the work mentioned in the contract and specifications in evidence before you, according to the said contract and specifications *as directed by the engineer,* and offered same to the defendant, through its agents and engineers, for acceptance, then you should find for the plaintiff, notwithstanding that the contract provides that 'no work shall be regarded as accepted until the final acceptance of the whole work herein contracted for.'"

The court modified this instruction by striking out the words italicised. The provision in the contract was that

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work was to be done in accordance with the specifica-
s and conditions of the agreement between the parties
to the satisfaction of the county of Russell and the
neer. The modification was clearly proper, and the
uction as given was as favorable to the plaintiff as
as entitled to have it.

he refusal of the court to give the plaintiff's instruc-
s numbered 1, 2 and 4 is assigned as error.

he object of these instructions, as stated by the plain-
n his petition for a writ of error, was to tell the jury
o was 'the engineer provided for in the contract be-
n the parties.'" The instructions were as follows:

"The court instructs the jury that it was the duty of
lefendant under the contract to appoint an engineer
t the stakes, establish the grades and do and perform
ther duties designated by the contract to be done and
rmed by the engineer, and if you believe from the
nce that in the course of the construction the said
ndant did appoint Messers. Dorden, Mullen, Cocke
Lancaster for the performance of these duties, then
Dorden, Mullen, Cocke and Lancaster became and
the agents and officers of the defendant in the con-
tion of said work, and all their acts as such engineers
r the contract are valid and binding upon the de-
nt.

"The court instructs the jury that the engineer named
provided for in the contract in evidence in this case
d was the person who performed and discharged the
s and did the things mentioned in said contract to be
and performed by the engineer, and that regardless
hat he may have termed himself or may have been
ed by others, and also regardless of his competency
competency in the science of engineering.

"The court instructs the jury that it was the duty
e engineer mentioned in the contract to establish lines

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and grades, to superintend and direct the work, and to make and furnish to the board of supervisors of Russell county estimates of the work done, and the party who performed and upon whom devolved these duties is the engineer under the terms of this contract, regardless of what name he may be called by."

The court modified instruction No. 1 by adding to it, "except in case of fraud on the part of the plaintiff or gross mistake made by the said engineers," and gave it as instruction "A."

The effect of instruction No. 1, as offered by the plaintiff, was to tell the jury that the persons named therein, by whatever name called, were "engineers" within the meaning of the contract, and that all their acts under the contract were valid and binding upon the defendant. The modification made in it by the court did not, in the slightest degree, change it as to the character of the persons named, nor the valid and binding effect of their acts under the contract "except in case of fraud on the part of the plaintiff or gross mistake made by the engineers." The modification or rather addendum made by the court was clearly proper, for the acts of engineers under such contracts are not binding upon either party when such acts have been induced by the fraud of the other party or are the result of fraud or mistake on the part of the engineers. so gross as to amount to fraud on the rights of the other party. *N. & W. Ry. Co.* v. *Mills*, 91 Va. 613, 22 S. E. 556.

By instructions 2 and 4 the court was asked to tell the jury that the persons who were required to do certain acts and perform certain duties under the contract were the engineers within its meaning. Having told the jury by instruction "A" that the persons named in that instruction (who the evidence showed did the work and performed the duties described in instructions 2 and 4) were to be considered the engineers within the meaning of the con-

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there was no necessity for giving the last named in-
ions, and the court did not err in rejecting them.
hout discussing further the assignments of error
upon the giving and refusing of instructions, it is
ent to say that this court is of opinion that the in-
ions given fully submitted the questions involved in
se to the jury, and submitted them as favorably as
fendant was entitled to have them submitted.
remaining assignment of error is to the refusal of
urt to set aside the verdict because it was contrary to
w and the evidence.
re was no error, as we have seen, to the prejudice of
aintiff in giving and refusing instructions, nor in the
sion of evidence. The case having been properly sub-
l to the jury, the only remaining question is as to
fficiency of the evidence to support the verdict of the
While the evidence is conflicting, there is ample evi-
to say the least, to justify the jury in believing that
ad was not constructed in accordance with the con-
and that the damage resulting to the county from
aintiff's failure to keep and perform its contract was
ch as the sum found by the jury in its favor.
judgment complained of must be affirmed.

Affirmed.

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Staunton

LUNSFORD'S ADMINISTRATOR *v.* COLONIAL COAL AND COKE COMPANY.

September 11, 1913.

Absent, Keith, P.

1. NEGLIGENCE—*Prevision—Licensees—Trespassers.*—The owner of premises does not owe to either trespassers or licensees the duty of prevision, or of keeping his premises in a safe condition. While he must not intentionally or wilfully injure them, the active duty of protection to licensees only arises after such owner knows of their danger, or might have known of it and avoided it by the use of ordinary care.
2. INFANTS—*Trespassers.*—The rule that a land owner does not owe to a trespasser the duty of keeping his land in a safe condition applies as well to infants as to adults.

Error to a judgment of the Circuit Court of Wise county in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Bond & Bruce, for the plaintiff in error.

Bullitt & Chalkley, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This is a personal injury action to recover damages for the death of plaintiff's intestate, May Lunsford, ascribed to the wrongful act of the defendant in error, the Colonial Coal and Coke Company, hereinafter referred to as "the

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any." The plaintiff brings error to the judgment e circuit court rendered for the company on a de- er to the evidence.

e material facts are these: May Lunsford, who at the of her death was three years and four months old, he daughter of James Lunsford, a coal miner in the oyment of the company, and lived with her parents in se leased from the company and located in the mining of Dorchester. The house fronts on a wagon road, d which and practically parallel with it at that point e track of the motor road, which is about forty feet the house. There was also a wire fence between the and the motor track which was in a dilapidated con- n. There were three houses, including the house oc- d by the Lunsfords, in a row on the same side of the r track, and the families who lived in these houses in the habit of using a path which crossed the track nt of them for the purpose of going to the commissary post-office and spring, and the miners to their work. e various places could also be reached by following agon road to the stable and thence across the track the streets of Dorchester, but the path afforded a r route and was habitually used for the purposes men- d by the three families referred to. It moreover ap- d that the children of these families were accustomed e the space between the dwellings and the motor track playground; but the track was a recognized place of er for children, and Lunsford had given his wife in- tions to keep their children off the track and had ped them for going upon it, fearing that they might n over and killed by the motor which ran along there ently and at a rate of speed which rendered it ex- ly dangerous to young children who might be on the . A small electric wire was strung along the motor and used to supply light to the company's barn and

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one of its tenant houses. This wire from some cause was weak and had frequently broken and from time to time been repaired in a crude way by any employee of the company who chanced to discover the break; and of its general condition the company had notice.

Shortly before the casualty, which caused the child's death two days later, the wire broke at a point five feet from the path. The details of the accident may best be told in the language of an eye-witness, Mrs. Farbush, who says: "I saw the little boy, the brother of May, take hold of the wire and put the end down against the track and it made a flash. I supposed at the time they had powder there. The little girl then took hold of the wire and stuck it down and there came a flash and set the little girl's clothes on fire. The boy was about six years old."

It thus appears that there was no danger in merely taking hold of the wire; no harm resulted to either child from that cause *per se,* but the injury came when the flash caused by bringing the end of the live wire in contact with the rail, set fire to the child's clothes; that was the proximate cause of the accident, a result which could hardly have been foreseen. Moreover, it is not pretended that the children had any business at the point of the accident. They were there in disobedience to the positive orders from their parents, and without the knowledge or consent of the company. They were in no sense invitees, and were trespassers, or at most bare licensees, upon the track. In neither relation did the company owe to plaintiff's intestate the duty of having the place of accident in safe condition. The duty of prevision is not due by the proprietor of premises to either one of those classes.

Speaking generally, the duty owing by the owner "to a trespasser on his premises is to do him no intentional or wilful injury." There must be such notice of the trespasser's danger as would put a prudent man on the alert before the duty of protection arises.

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lso with respect to a bare licensee (that is to say
ho is permitted by the passive acquiescence of the
to come on his premises for his own convenience).
kes upon himself all the ordinary risks attached to
ce and the business carried on there." The owner
ot intentionally or wilfully injure him, but he owes
e active duty of protection only after he knows of his
, or might have known of it and avoided it by the
ordinary care. These principles have been repeat-
nnounced by this court and are conclusive of the
Nichol's Admr. v. *W. O. &c. R. Co.*, 83 Va. 102, 5
171; *N. & W. R. Co.* v. *Wood*, 99 Va. 156, 37 S. E.
Valker v. *Potomac, &c. R. Co.*, 105 Va. 226, 53 S. E.
L. R. A. (N. S.) 80; *Clark* v. *Fehlhaber*, 106 Va.
6 S. E. 817, 13 L. R. A. (N. S.) 442; *Eaton* v. *Moore*,
a. 400, 69 S. E. 366.

Walker v. *Potomac, &c. R. Co., supra* (a turntable
n which an infant was killed), the authorities are re-
d at length, and the court reaches the conclusion
he rule that a land owner does not owe to a trespasser
uty of keeping his land in a safe condition applies
ll to infants as to adults.

on the whole case, we find no error in the judgment
review, and it must be affirmed.

Affirmed.

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Staunton

LYNCH v. O'BRIEN AND OTHERS.

September 11, 1913.

Absent, Keith, P.

1. BILLS AND NOTES—*Endorsement—Release of Security—Renewals—Estoppel—Waiver.*—One who has repeatedly renewed his endorsement of a note after full knowledge that a part of the collateral put up by the maker with the original note had been withdrawn by him must be held to have waived that defense, and to be estopped from availing himself of it as to the renewal.
2. EVIDENCE—*Written Instruments—Parol Evidence to Vary—Bills and Notes.*—The endorser of a negotiable note will not be permitted to show by parol that he was not to be bound by his endorsement. Parol contemporaneous evidence is not admissible to vary, alter or contradict the terms of a valid written instrument.

Appeal from a decree of the Law and Chancery Court of the city of Roanoke. Decree for the defendant. Complainant appeals.

Affirmed.

The opinion states the case.

Thomas W. Miller and *Jackson & Henson,* for the appellant.

A. E. King, for the appellees.

HARRISON, J., delivered the opinion of the court.

The bill in this suit was filed by the appellant for the purpose of obtaining release from his liability as endorser upon a certain negotiable note. The ground upon which the

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se was asked is that thirty-two shares of certain stock been deposited with the original note, when executed, llateral, and that subsequently seven shares of this was surrendered without appellant's consent.

appears that in March, 1907, E. F. O'Brien executed e for $3,200, payable to the appellant, J. W. Lynch, E. W. Tinsley sixty days after date. This note was sed by the payees and discounted for O'Brien by the National Bank of Roanoke. In the body of the note peared that thirty-two shares of Roanoke Knitting stock was deposited therewith as collateral. The note urtailed by O'Brien and renewed from time to time e same shape, and with the same endorsement, until s reduced to $2,100. The renewal for $2,100 was in hape of a plain negotiable note without mention of teral. At the time of this last mentioned renewal ien withdrew seven shares of the stock, leaving with ank the remaining twenty-five shares. O'Brien made rther payment. The note was, however, subsequently wed from time to time, with same endorsement, until as reduced to $1,800 by payments made by the en-ers.

e evidence is beyond dispute that, when appellant en-ed the several renewals of the $1,800 note now held by appellee bank and from which he seeks to be released, ad full knowledge of the fact that the seven shares of k had been withdrawn by O'Brien. Having repeatedly wed his endorsement of the note after full knowledge e defense available in respect to the original note, ap-nt must be held to have waived such defense and to be pped from availing himself of it as to the renewal. principle is elementary. Joyce on Defenses to Com. er, sec. 649; *Building Asso.* v. *Blair,* 96 Va. 490, 495, 36 . 513; *University Va.* v. *Snyder,* 100 Va. 567, 579, 42 . 337.

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Appellant relies upon an alleged parol agreement that he was not to be liable upon his endorsement of the renewals because of the previous withdrawals of the seven shares of stock held as collateral. This parol contract is not satisfactorily shown. This, however, is immaterial, it being settled by numerous decisions of this court that a contemporaneous parol agreement cannot be shown to alter or vary the terms of a valid written instrument. *Towner* v. *Lucas,* 13 Gratt. (54 Va.) 705; *Slaughter* v. *Smither,* 98 Va. 202, 33 S. E. 544; *Percy* v. *Bank,* 110 Va. 132, 65 S. E. 475. The absolute endorsement of the note in question cannot, therefore, be affected by a contemporaneous agreement that notwithstanding such endorsement appellant was not to be bound by it. *Woodward, Baldwin & Co.* v. *Foster,* 18 Gratt. (59 Va.) 200.

The decree denying the relief asked in this case is plainly right and it must be affirmed.

Affirmed.

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Staunton

MARSTELLER v. WARDEN & HAILEY.

September 11, 1913.

Absent, Keith, P.

ENCE——*Written Contract—Incomplete—Parol Evidence as to Omitted Terms.*—In a written contract for the construction of he walls of a church, and also the walls of a tower, a stipula- on "that the walls of the tower shall correspond with the alls of the church" applies to and controls the quality, finish d appearance of the material to be used, so as to maintain iformity of aspect between different portions of the same ucture, and does not control the thickness of the tower wall. e contract, so far as it relates to the thickness of the tower ll, is incomplete on its face, and parol evidence is admissible show what the real contract between the parties was on that bject.

CE——*Written Contract—Incomplete—Parol Evidence.*—The e excluding parol evidence to vary a written contract has no plication when it is apparent from the writing itself that it es not embody the entire agreement. In such case, the writing ing incomplete, it must be supplemented by other evidence, t to contradict or vary its terms, but to establish the real ntract between the parties.

DICTION—*Contracts Partly Written.*—While courts of equity lone have jurisdiction of suits for the reformation of contracts, he jurisdiction of courts of law for the enforcement of con- racts partly in writing and partly parol is unquestioned.

AGES——*Excessive—Verdicts.*—The verdict of a jury will not be et aside as excessive where the plaintiff's recovery is much less than the amount claimed in his bill of particulars, and the amount and correctness of the items claimed are dependent upon conflicting views of the evidence.

or to a judgment of the Law and Chancery Court of y of Roanoke in an action of assumpsit. Judgment e plaintiffs. Defendants assign error.

Affirmed.

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The opinion states the case.

A. E. King and *Poindexter & Hopwood,* for the plaintiff in error.

Jackson & Henson, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

J. K. Warden and A. J. Hailey recovered a judgment for $2,000 against J. H. Marsteller (doing business as Marsteller Granite Works) in an action of assumpsit on a building contract.

The trustees of St. Paul's Episcopal Church in Lynchburg, Virginia, made a contract with J. P. Pettyjohn for the erection of a parish house and the completion of an unfinished tower on the main building. The building was constructed of "Peak Creek" stone, taken from quarries in Pulaski county, Virginia. Pettyjohn sublet the principal part of the work to the defendant Marsteller, who, in turn, let the stone work to the plaintiffs, who were owners of a "Peak Creek" stone quarry and experienced workmen. The defendant's place of business was in Roanoke, but a branch establishment was maintained in Lynchburg under the management of C. G. Loving. Negotiations were opened between Loving and the plaintiffs touching this work which culminated on September 16, 1910, in a written offer by the plaintiffs to furnish "Peak Creek" stone and erect the parish house for $7,459; and to supply the stone and complete the tower, according to specifications and drawing, of the following dimensions: "32 feet high, 20 x 20 feet, walls to be 1.6 (one foot six inches) "thick," for $3,099.00. On October 17, 1910, there was a written acceptance of this proposition by Loving. Two days later the attorney for the plaintiffs undertook to reduce the

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eement to writing, and the paper prepared was duly
ıed by the parties. The plaintiffs promptly commenced
k on the parish house, and after having completed that
lding were ready to proceed with work on the tower.
that end they had already gotten out and delivered on
ground a quantity of stone suitable for the tower, when
y discovered the original pencil sketch of the work upon
ch their bid was predicated had been mislaid. There-
n, the plaintiffs called for plans and specifications for
completion of the tower, which were made and fur-
ıed by the defendant about June 10, 1911. An exami-
ion of these plans showed that they called for tower
ls twenty-six inches thick, while, as stated, the written
posal of the plaintiffs, which was accepted by the de-
lant, provided for an eighteen inch wall. This dis-
pancy seems to have been the origin of the misunder-
ıding and bone of contention between the parties. No
ıtion was made in the written contract of the thickness
he tower walls, and therefore the insistence of the plain-
s was that the instrument was incomplete on its face,
that parol evidence was admissible to show the true
eement of the parties on the subject.

The countervailing theory of the defendant is that the
pulation in the contract, "that the walls of the tower
uld correspond with the walls of the church," covered
point in dispute as to the thickness of the tower walls;
t the contract in that respect was complete on its face,
consequently that the alleged omitted language, that
walls were to be eighteen inches thick, could not be
l into it. This pretension on behalf of the defendant
vades the entire case, and was urged at every stage of
by demurrer to the declaration, by objection to the ad-
sibility of evidence, and by instructions to the jury.

The law and chancery court resolved the proposition
avor of the plaintiff, and tried the case on that theory;

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and that ruling, in its various phases, is assigned as error and is relied on to reverse the judgment. It constitutes the controlling question in the case, and if correctly decided by the trial court renders the discussion of subordinate assignments, which could in no event affect the general result, unnecessary.

The language relied on and quoted by the defendant as showing the thickness of the tower walls, namely, "that the walls of the tower should correspond with the walls of the church," in the connection in which it occurs, was evidently intended to apply to and control the quality, finish and appearance of the material to be used so as to maintain uniformity of aspect between different portions of the same structure; but it plainly does not supply the omitted stipulation, that the tower walls were to be eighteen inches thick. The overwhelming weight of the evidence shows that the true contract between the parties called for an eighteen inch wall, and that the omission of that provision from the contract was the result of inadvertence on the part of the scrivener. Besides, the verdict of the jury has settled that question and all other controverted issues of fact in favor of the plaintiffs.

The principle of law applicable to the question under consideration is well settled.

In *Farmers Manufacturing Co.* v. *Woodworth,* 109 Va. 596, the court, at page 601, 64 S. E. 986, at page 988, observes: "The rule of exclusion of parol evidence has no application when it is apparent from the writing itself that it does not embody the entire agreement. In such case, the writing being incomplete, it must be supplemented by other evidence, not to contradict or vary its terms, but to establish the real contract between the parties."

It does not involve the doctrine of reformation of contracts, of which courts of equity alone have cognizance; but applies where the contract is partly in writing and partly

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arol. The jurisdiction of courts of law in the latter class cases is unquestioned. *Grove* v. *Lemley*, 114 Va. 202, 76 E. 305.

Considering the last assignment as upon a demurrer the evidence, the verdict of the jury cannot be disturbed pon the ground that it is excessive. The bill of particurs filed with the declaration is largely in excess of the amages awarded, and the amount and correctness of the ems claimed are dependent upon conflicting views of the vidence, and have been settled by the jury.

Affirmed.

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Staunton

MARTIN v. HALL.

September 11, 1913.

Absent, Keith, P., and Whittle, J.

1. DEEDS—*Consideration—Evidence to Contradict—Case in Judgment.*—The statement in a deed of a money consideration and of its payment is a mere recital, and, while such recital is *prima facie* evidence of the facts recited, the true consideration for the conveyance may be inquired into, and it may be shown by parol evidence that the actual consideration paid or promised was different from that stated in the deed, and also to contradict the recital in the deed that the consideration had been paid, provided such evidence does not alter or contradict the legal import of the deed. In the case in judgment, while the deed recited a money consideration paid, the parties were permitted to show that the real consideration was the future support and maintenance of the grantor.
2. EQUITY—*Rescission—Deed in Consideration of Support.*—Where the consideration of a deed is the maintenance and support of the grantor by the grantee, during the latter's life, and he fails or refuses to furnish support, the grantor may come into a court of equity and have the conveyance rescinded, as he has no adequate remedy at law.

Appeal from a decree of the Circuit Court of Bedford county. Decree for the complainant. Defendant appeals.

Affirmed.

The opinion states the case.

S. S. Lambeth, Jr., and *Landon & Lowry,* for the appellant.

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son Sale, Robert W. Withers and *S. V. Kemp,* for
ppellee.

CHANAN, J., delivered the opinion of the court.

object of this suit was to set aside and annul a deed
ich the appellee conveyed to the appellant a tract of
ontaining about one hundred and thirty acres. The
prayed for was granted by the circuit court, and from
ction this appeal was allowed.

material question involved in the case is whether
t parol evidence was admissible to show that the
onsideration for the land conveyed was the support
naintenance of the grantor during his life by the
ee instead of the money consideration stated in the

deed, omitting formal parts, is as follows:

tnesseth: That for and in consideration of the sum
hundred dollars in hand paid by the said party of the
part, the receipt whereof is hereby acknowledged,
id party of the first part has bargained and sold,
y these presents does sell, release and convey with
l warranty unto the said party of the other part all
title and interest in and to a certain tract or parcel
l lying in the south side of Bedford county, on the
vaters of Ashwell's mill creek, adjoining the lands
issa J. Kennett, Allen A. J. Hall and others, and
the same land purchased from John Hall's estate,
ning 132½ acres be the same more or less."

statement in the deed as to the consideration is a
ecital of the amount and that it had been paid; but
such recital is *prima facie* evidence of the facts re-
the true consideration for the conveyance may be
ed into and it may be shown by parol evidence that
tual consideration paid or promised was different

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from that stated in the deed, and also to contradict the recital in the deed that the consideration had been paid, provided such evidence does not alter or contradict the legal import of the deed. See *McKee* v. *Bunting, McNeal Real Est. Co.*, 114 Va. 639, 77 S. E. 515, and authorities there cited.

The parol evidence offered and considered by the trial court did not alter or in any way affect the legal import of the deed. It satisfactorily shows that while as a matter of form six hundred dollars passed through the hands of the grantee to the grantor, it was immediately returned to the grantee's father, and that the real consideration for the conveyance was the support and maintenance of the grantor during his life by the grantee. The parties seem to be quite ignorant, and the evidence tended to show that they had the impression that although the true consideration for the deed was the support and maintenance of the grantor, it was necessary to give validity to the deed that it should recite or state that a money consideration had passed. Pursuant to the real agreement between the grantor and the grantee, the latter did support and maintain the former after the execution of the conveyance in 1904 for about two years. Then differences arose between them. The grantee refused to wash the grantor's clothing or to have it done for him, and he had to get it done elsewhere and pay for it. On account of unkind treatment the grantor left the premises for a time. The parties afterwards tried to adjust or have their differences adjusted, but were unable or failed to do so. Just previous to the institution of this suit the grantor went to the premises which he had conveyed to the grantee to talk with the grantee about their matters when she ordered the grantor to leave the premises and denied that she was under any obligation to support and maintain him, claiming then, as she does now, that the consideration for the conveyance was money and not support and maintenance.

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o good purpose could be subserved by discussing in
il the evidence in the case. It will be sufficient to say
it satisfactorily shows that the real consideration for
conveyance sought to be set aside was the support and
ntenance of the grantor for life by the grantee; that
latter has not only failed to support and maintain the
ntor, but before the institution of this suit, as well as
er answer to the bill and in her deposition, denied that
was under any legal obligation to do so. The considera-
of the conveyance for support and maintenance having
s failed, the grantor was entitled under the decisions of
court in *Wampler* v. *Wampler,* 30 Gratt. (71 Va.)
; *Lowman* v. *Crawford,* 99 Va. 688, 40 S. E. 17; and
ster v. *Cubino,* 101 Va. 768, 45 S. E. 285, to come into
urt of equity, because he had no adequate remedy at
, and have the conveyance rescinded.
The decree complained of must, therefore, be affirmed.

Affirmed.

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Staunton

NESBIT v. WEBB.

September 11, 1913.

Absent, Keith, P.

1. MASTER AND SERVANT—*Safe Premises—Servant Returning From Work—Invitee—Railroads.*—An engineer of a railroad company, while returning from his completed task over the property of the company along a route that he and other employees had pursued with the knowledge of the company for fifteen years, is neither a trespasser nor a licensee, but an invitee, and entitled to protection as such from the dangers of an unguarded ditch dug across such route of which he has no knowledge.
2. INSTRUCTIONS—*Abstract Propositions.*—It is not error to refuse an instruction which states an abstract proposition that could have been of no help to the jury in determining the question at issue.
3. INSTRUCTIONS—*Fully Instructed.*—It is not error to refuse to further instruct the jury when they have been fully instructed upon every phase of the case covered by the additional instruction proposed.
4. INVITEES—*Unsafe Premises—Liability of Owner or Occupier.*—The owner or occupier of land who, by invitation, express or implied, induces or leads others to come upon his premises for any lawful purpose is liable in damages to such persons (they using due care) for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public or to those who were likely to act upon such invitation.
5. NEGLIGENCE—*Unsafe Premises—Excavations.*—If a person knows that people are using, and for years have been using, property as a right of way, then it is his duty in making excavations across such pathway, or putting obstructions thereon, to exercise reasonable care and not negligently injure persons so in the habit of using such pathway.
6. APPEAL AND ERROR—*Conflicting Evidence—Verdicts.*—Where the evidence in a case is conflicting and the case has been fairly sub-

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mitted to the jury, under proper instructions from the trial court, the verdict of the jury, approved by the trial court, will not be disturbed by this court.

or to a judgment of the Corporation Court of the Roanoke in an action of trespass on the case. Judgor the plaintiff. Defendant assigns error.

Affirmed

opinion states the case.

& Woods, for the plaintiff in error.

son & Henson and *Hoge & Williams,* for the det in error.

RISON, J., delivered the opinion of the court.

action was brought by J. E. Webb to recover of J. bit damages for injuries alleged to have been oced by the negligence of the defendant. The trial d in a verdict and judgment in favor of the plaintiff, we are asked by the defendant to review.

petition assigns two grounds of error: (1) That rt erred in giving and refusing instructions: and (2) t erred in overruling the motion for a new trial.

ved from the standpoint of a demurrer to the evithe pertinent facts appear to be that the defendant, ing contractor, was engaged in constructing a round for the Norfolk and Western Railway Company in st Roanoke yards. The round house was to be cond on the site of an old one, consisting of twentylls, which was to be taken down in sections of six at a time, so that the railway company could conts use until the new round house was ready. The ouse was to be much larger than the old one, the

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outer wall thereof being located from twenty-five to thirty feet distant from the outer wall of the old house. Stalls 17, 18 and 19 were among those included in the first six that were turned over to the defendant. From these stalls there were tracks running, which extended outside the walls of the old round house, through arches cut therein, for some distance in an easterly direction. These tracks together with a passage way through the round house were constantly used day and night by the employees of the company with its full knowledge and consent as a convenient passway in going to and returning from their work. This passway led to the street and was not only a convenient way for the numerous employees using it, especially those living in southeast Roanoke, but it is shown to have been their safest route, on account of moving trains and shifting engines likely to be encountered by them in traveling the most feasible route other than this one. This was the situation on the first day of July, 1912, when the defendant commenced the execution of his contract for building the new round house. Prior to the accident the defendant had dug a ditch four feet wide and about six feet deep immediately across the pathway habitually used by the employees. This ditch was to be continued as the foundation for the new round house. At 1:30 on the morning of July 5, 1912, the plaintiff, a locomotive engineer, came in from his run, put his engine away and started on the usual route traveled by himself and other employees, which was pursued until he suddenly fell headlong into the ditch which the defendant had dug, and thereby received the injuries for which he seeks damages in this suit. The plaintiff did not know that the ditch had been dug, and encountered no obstruction along the route traveled by him. There was sufficient light on the inside and outside of the round house to enable one to travel with reasonable safety in the absence of concealed danger.

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theory of the plaintiff, as stated in his declaration, at the employees of the railway company had been omed to use the way traveled by him on the night of cident, both before and after the defendant dug the n which he fell, and that the defendant knew, or in ercise of reasonable care should have known, that nd that it was his duty in making an excavation such passway to exercise reasonable care not to in- rsons so in the habit of using such way.

ddition to a general denial, the defendant interposed fense of contributory negligence on the part of the ff, contending that the plaintiff had no right to be place where the accident happened; that he was a sser, or at most a bare licensee, and the defendant im no duty, except not to wantonly and wilfully him.

defendant complains of the action of the court in g instructions "A" and "B" offered by him.

ruction "A" tells the jury, "that if they believe from dence that the Norfolk and Western Railway Com- ad turned over to the defendant the possession of remises for the purpose of tearing down the round located thereon and rebuilding the same, and that intiff was not required to go on said premises for rpose in the performance of his duties as an engi- the Norfolk and Western Railway Company, and e plaintiff went thereon at the time he was injured own convenience, then the plaintiff had no legal n said premises, and the defendant owed him no o keep said premises in a safe condition; and in upon said premises, the plaintiff assumed all risks ger arising from the condition of the premises by of work done thereon by defendant in the per- ce of his contract with the Norfolk and Western y Company to tear down and rebuild the round located thereon."

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This instruction was properly refused. There is no evidence that the plaintiff was on the premises where the accident happened for his own convenience. On the contrary, the uncontradicted evidence shows that the plaintiff was using the premises while in the discharge of his duties as an employee of the railway company. He was returning from his completed task by the usual route that he had pursued for fifteen years prior to the night of the accident. The defendant was only in possession of a small portion of the round house for certain purposes, the rest of the premises having been retained for the time by the railway company for the uses to which they had always been put, and the plaintiff was using such premises in the discharge of his duties, without any knowledge that they had been rendered dangerous by the defendant, while the defendant knew, or by the exercise of reasonable diligence should have known, that the premises were being used by the employees of the company, and that they were likely to be injured unless the ditch dug across their pathway was reasonably safeguarded.

Instruction "B" tells the jury, "that if they believe from the evidence that the plaintiff had no legal right on said premises, then the only duty that the defendant owed to him was not wilfully to injure him while on said premises."

This is an abstract proposition that could have been of no help to the jury in determining the question at issue. Apart from these considerations, the jury was by other instructions abundantly and liberallly instructed upon every phase of the defendant's theory of the case and he could not possibly have suffered any prejudice from the court's action in refusing to give these two instructions. It is clear from the authorities that the plaintiff was not a trespasser or mere licensee, but was using the premises by implied invitation.

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Bennett v. *Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235, Justice Harlan, speaking for the court, says that the founded in justice and necessity and illustrated in y adjudged cases in the American courts is "that the er or occupant of land who, by invitation, express or ied, induces or leads others to come upon his premises, any lawful purpose, is liable in damages to such per—they using due care—for injuries occasioned by the fe condition of the land or its approaches, if such con- n was known to him and not to them, and was negli- ly suffered to exist, without timely notice to the public those who were likely to act upon such invitation."

he rule that is applied to a railroad in this State is that s the right to a clear track, and is not liable for injury ersons received upon its track; but if the company vs, or by the exercise of ordinary care should know, persons are in the habit of, and have been for some , using its track as a foot path, so that it has no right pect a clear track, then it is the duty of the company xercise reasonable care to prevent injury to persons the track at such place. *C. & O. Ry. C.* v. *Corbin*, 110 700, 67 S. E. 179.

he rule applicable to railroads is applied generally. e v. *City of Richmond*, 79 Va. 86; *N. & W. Ry. Co.* v. *Board's Admr.*, 91 Va. 700, 22 S. E. 514; *Henry* v. *row Mining Co.*, 144 Mo. App. 350, 128 S. W. 841; *De* v. *Ford Heim Brewing Company*, 62 Kan. 188, 61 689.

Henry v. *Disbrow Mining Co., supra*, the rule is thus d: "If a person knows that people are using property right of way, and have been using same for such th of time that the presence of persons upon the same be expected, then it is his duty in making excavations ss such pathway, or putting obstructions thereon, to cise reasonable care and not negligently injure persons the habit of using such pathway."

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In *De Farr* v. *Ford Heim Brewing Company, supra,* the rule is stated in the first syllabus in the following language: "Where the public has passed over private property for a long time with the implied permission of the owner, or those in control of the same, and where it may be said that a portion of the property is temporarily devoted to a public use, persons using the way are not deemed to be trespassers or mere licensees; and the owner or those in control cannot without liability make excavations, nor leave unprotected openings, so close to the line in such way as to render travel thereon unsafe."

The objection to instructions No. 1, given for the plaintiff, is not well taken. In the light of the foregoing authorities that instruction clearly and accurately states the law applicable to the plaintiff's theory of the case and has abundant evidence for its support.

The petition for a writ of error contends that the condition of the premises, resulting from beginning the work of dismantling the stalls, was at the time of the accident sufficient to warn the plaintiff of the danger of using the route he did, and that in using such route he assumed the risk of injury and cannot charge the result to the defendant. The defendant had only worked on the premises for three days prior to the accident, and there is a conflict in the evidence as to what had been done prior thereto, and the aspect the premises presented at the time of the accident. The evidence, however, is overwhelming that there was no obstruction whatever to the passway over which the plaintiff traveled between the exit from the stall and the point where he fell into the ditch. This question, involving the contention that the plaintiff was guilty of contributory negligence, was submitted to the jury under instructions which stated the law as fully as could be desired, and their verdict is conclusive on the point.

Without further detail it is sufficient to say in conclu-

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ion that we have carefully examined the entire record and ind that the evidence upon most of the vital issues was onflicting, and that the case was fairly submitted to the ury under the instructions given. The jury having de-ided that conflict in favor of the plaintiff, and the judge of the trial court having approved their verdict, this court will not, upon well settled principles, interfere with that finding.

The judgment complained of must be affirmed.

Affirmed.

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Staunton

C. L. RITTER LUMBER COMPANY, INC. v. COAL MOUNTAIN MINING COMPANY.

September 11, 1913.

Absent, Keith, P.

1. APPEAL AND ERROR—*Amount in Controversy—Burden of Proof.*—The burden of showing jurisdiction to hear an appeal is on the plaintiff in error, and such jurisdiction must affirmatively appear from the record. If the jurisdiction is determined by the pecuniary amount involved, and this cannot be ascertained, the appeal will be dismissed.
2. APPEAL AND ERROR—*Amount in Controversy—Balance of a Debt—Payments.*—Where a decree fixes upon a defendant a personal liability for whatever balance of a debt remains unpaid after crediting thereon the proceeds of the sale of a tract of land decreed to be sold to pay the debt, the amount of defendant's liability cannot be ascertained until the land has been sold; and where, as in this case, the liability of the defendant is merely pecuniary, he has no right of appeal until the extent of his pecuniary liability has been fixed, which can only be done after a sale of the land. This is not a case where a fixed pecuniary liability has been reduced by subsequent payments.

Appeal from a decree of the Circuit Court of Tazewell county. Decree for the complainant. Defendant appeals.

Appeal dismissed.

The opinion states the case.

George W. St. Clair, for the appellant.

Greever & Gillespie, for the appellee.

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VHITTLE, J., delivered the opinion of the court.

The appellee, the Coal Mountain Mining Company, con-ed to R. A. Ayers 183.60 acres of land situated in Buch-n county for $2,754, $688.50 of which was paid in cash the residue was divided into three credit instalments $688.50 each. Notes were taken for the deferred pay-nts, and a vendor's lien reserved on the face of the d to secure the unpaid purchase money. R. A. Ayers rwards conveyed the land to the Empire Coal Land poration, and that corporation sold the merchantable ding timber on the tract to the appellant, the C. L. ter Lumber Company, Inc., which cut and removed tim-therefrom of the value of $1,018.50. The appellee then l a bill in equity against R. A. Ayers, the C. L. Ritter nber Co., Inc., and others, to recover of Ayers the unt of unpaid purchase money and to subject the land ale to satisfy the vendor's lien. The bill further prayed , if the proceeds of sale of the property should prove fficient to discharge the lien, the plaintiff might re-r of the C. L. Ritter Lumber Company, Inc., the bal-e of the amount due under the deed, provided such bal-e did not exceed $1,018.50, the value of the timber cut removed from the land by that company. From a de-in accordance with the prayer of the bill the C. L. er Lumber Company, Inc., appealed.

We are met at the threshold of the case with a motion to iss the appeal on the ground that it was improvidently rded. In respect to that motion it must be observed the decree against the appellant is not absolute, but onditioned upon the failure of the land, the primary ect for payment of the debt, when exposed to sale, to luce an amount sufficient to discharge in whole or in the vendor's lien resting upon it. Until such sale decree against the appellant is not enforcable, and

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then it is only enforcable for such amount as may remain unpaid after applying the proceeds of sale to the original debt. It is, therefore, obvious that the ultimate liability of the appellant is at present wholly conjectural and cannot be ascertained until the land, the primary subject for the payment of the debt, has been sold.

Section 3455 of the Code declares, that "no petition shall be presented for an appeal from, or writ of error or supersedeas to, any final judgment, decree, or order of any court . . . where the controversy is for a matter less in value or amount than three hundred dollars, unless there be drawn in question a freehold or franchise or the title or bounds of land, or the order of the State Corporation Commission, or some matter not merely pecuniary."

The rule is settled in Virginia that the "burden of showing the existence of jurisdiction to hear the appeal is on the plaintiff in error, and such jurisdiction must affirmatively appear from the record." Notes to secs. 3454, 3455, of the Code, citing *Com'th* v. *Chaffin,* 87 Va. 545, 12 S. E. 972; *Southern Fertilizing Co.* v. *Nelson,* 6 Va. Law J. 162.

In *Williamson* v. *Payne,* 103 Va. 551, 49 S. E. 660, the court quotes with approval the statement of the law from 2 Cyc. 555, that "generally speaking, the value or amount in controversy must be made to appear affirmatively. If it cannot be ascertained, the appeal will be dismissed, and the burden is on appellant to establish the jurisdiction."

The following qualification of the general rule does not affect this case, namely, that "on the other hand, when the original demand is pecuniary and in excess of the jurisdictional amount, but is alleged by the appellee to have been reduced below that amount by payment, the *onus* rests upon him to make that fact appear." *Fink Bros. & Co.* v. *Denny,* 75 Va. 663; *Filler* v. *Tyler,* 91 Va. 458, 22 S. E. 235. The principle announced in *Williamson* v. *Payne, supra,* is followed in *Lamb* v. *Thompson,* 112 Va. 134, 70 S. E. 507.

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n *Marchant* v. *Healy,* 94 Va. 614, 27 S. E. 464, it was
that where the difference between the debt asserted
he plaintiff in the lower court and the amount paid
eon by the sale of the debtor's land is less than the
sdictional amount, no appeal lies.
will be further noted that this case is not controlled
he provision of section 3454, giving a party the right
ppeal from an interlocutory decree "adjudicating the
nciples of a cause."
he application for appeal is not amenable to objection
use the decree does not adjudicate the principles of
cause, but because, as we have endeavored to show,
it does not now appear, nor can it be made to appear
il there has been a sale of the land, that the liability
he appellant, which is merely pecuniary, will ultimate-
mount to $300.
f the land when sold should bring enough to satisfy the
dor's lien, there will be no liability on the appellant,
consequently it will not have been aggrieved by the de-
appealed from. And if on the other hand, the land
n sold should come within $300 of paying off the ven-
s lien, then the appellant, though aggrieved to the ex-
of deficit, would have no redress by way of appeal.
ur conclusion is that the appeal must be dismissed as
ng been improvidently awarded, but without prejudice
ppellant's right to apply for another appeal if war-
ed by future developments in the case.

Appeal dismissed.

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Staunton

ROSS AND OTHERS v. ROSS, EXECUTRIX, AND OTHERS.

September 11, 1913.

Absent, Keith, P., and Whittle, J.

1. WILLS—*Object of Construction—Expressed Intention of Testator.*—The object in construing a will is to arrive at the true intention of the testator as gathered from the language used; that is, his expressed intention, disclosed by the meaning of the words used, when properly interpreted, rather than his presumed or supposed intention.
2. WILLS—*Construction—Technical Words.*—In construing wills the words used should be given their ordinary and usual signification; but where technical words are used, they are presumed to be used technically, and words of a definite legal signification are to be understood as used in their definite legal sense, unless the contrary appears on the face of the instrument.
3. WILLS—*Construction—Case in Judgment—Personal Property—Choses in Action.*—A testator of little learning, but of fine sense and large business experience, and familiar with the difference between real and personal property and the different kinds of personal property, made a holograph will. By it he gave to his wife a designated piece of real estate and "three thousand dollars in cash from any money that may be to my credit at the time of my death, and all of my personal property of every description." He gave to his youngest daughter two designated pieces of real estate, and then requested that all other property owned by him, except such as he had given away in the will, be kept together until his youngest child became of age, and then equally divided amongst all of his children. He appointed his wife agent "to take in charge all of my property and collect all rents and make improvements and give to herself and children and unmarried daughter a support out of any rents she may collect until the youngest child becomes of age." His estate consisted of real estate, household and kitchen furniture, a large amount of bonds and notes, many of which were not due at the time of his death, and less than $1,000 in bank.

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Held: The surviving wife is entitled to the entire personal estate of the testator, including choses in action, and that the provision for support means support according to their station in life, and if the net rents are more than sufficient for that purpose, the surplus over a support should be preserved for distribution among all the children when the youngest reaches maturity.

ppeal from a decree of the Circuit Court of the city of chburg. Decree for the defendants. Complainants eal.

Modified and Affirmed.

he opinion states the case.

meltzer V. Kemp and *John L. Lee,* for the appellants.

. S. Kirkpatrick, for the appellees.

ARRISON, J., delivered the opinion of the court.

he late Eugene E. Ross departed this life at his home Campbell county in June, 1912, leaving surviving him wife, Lizzie I. Ross, and nine children. The deceased twice married, and seven of the children surviving him e the offspring of his first marriage, the remaining two g the children of his second and surviving wife, the ngest of these two being born after the father's death. he bill in this case was filed by the six adult children he first marriage for the purpose of having construed holograph will left by Eugene E. Ross, dated August 1905, and duly probated in June, 1912. The will men-ed is as follows:

give to my Wife Lizzie I. Ross one Duble Tenemt se on the Corner of 8th and Wise Street in Lynchburg, and three thousin Dollars in Cash from eny Muney may bee to my Credet at the time of my Deth and All pursnal Property of Every Discription I Give to Doh-

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erty Ross my youngest Daughter two houses and Lots in Campbell County none as Lots 10 and 11 in Fair ground Adition Saime Lots as Come to me from John A. Faulkner.

"it is my Request that all other Property ownered By me Shall bee kept to Gether Except thee Carpented Chops located in Park avenue Adition whitch I wood Advice the Saile as Soon as Poseble all other Property Except sushas I have Given a way in this will Shall be Ceped to Gether untell my youngest Child become of Age then Equly Devided beleen all of my Children including Doherty Ross and I appoint my wife Lizzie I. Ross my agent to take incharge of all of my Property and Corlect all Rents and make Improvements and give to hirsif and children and unmared Dauter a Support out of Eny Rents She may Corlec untell the youngest Child become of Age I further more Request that no Bond be Required of Hir in wilness of the Above," etc.

It is apparent from the testator's spelling and punctuation that he was a man of little learning. The record, however, shows that he was a man of fine sense, excellent judgment and good business qualifications who had acquired by his thrift and business sense an estate valued at more than $50,000, which was nearly equally divided between real and personal property. While his spelling and punctuation are bad, the intention of the testator is expressed with reasonable clearness.

The present controversy concerns chiefly the first sentence of the will, which is as follows: "I give to my wife, Lizzie I. Ross, one double tenement house on the corner of 8th and Wise streets in Lynchburg, Va., and three thousand dollars in cash from any money that may be to my credit at the time of my death, and all my personal property of every desciption."

At the time of the testator's death he had securities, principally deeds of trust or mortgages, aggregating about

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000, and something over $1,000 in cash to his credit in
. The interpretation which the complainants, who
he appellants here, insist upon giving to the foregoing
uage employed by the testator is that the cash to his
it at the time of his death included the bonds and notes
by him, and that the whole, cash on hand and the se-
ies left, must be treated as one fund out of which the
0 given his wife in cash from any money he might
to his credit must be paid, that the testator did not
the term "personal property" in its technical sense,
intended by the words "all my personal property of
description" to give his wife only the tangible house-
property; that if he had intended to give her all his
onal property of every description, there would have
no occasion for the provision of $3,000 in cash from
money that might be to his credit at the time of his
, as the term personal property technically used would
the $3,000 in cash as well as the notes and bonds.
Allison v. *Allison,* 101 Va. 543-4, 44 S. E. 906, 63 L.
. 920, it is said: "The object in construing wills is to
e at the true intent of the testator, but that intent is
gathered from the language used, for the object of
ruction is not to ascertain the presumed or supposed,
he expressed intention of the testator: that is, the
ing which the words of the will, correctly interpreted,
ey. *Wooten* v. *Redd's Ex'or,* 12 Gratt. (53 Va.) 206;
her v. *Hatcher,* 80 Va. 171; *Waring* v. *Bosher's*
r., 91 Va. 286, 21 S. E. 464.
n construing wills the words used should be given
ordinary and usual signification; but, where techni-
ords are used, they are presumed to be used techni-
, and words of a definite legal signification are to be
rstood as used in their definite legal sense, unless the
ary appears on the face of the instrument. *Waring*
aring, 96 Va. 641, 32 S. E. 150."

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Guided by these well settled principles, we are of opinio that the construction contended for by the appellants strained and not warranted by the language used, a would wholly fail to effectuate the manifest intention of t testator. In addition to the presumption that the testat understood the technical meaning of the term "person property" and that he used the words "all my person property of every description" in their usual and ordina sense, and not in the restricted sense suggested by t appellants, it is shown of record that he had enjoyed lar and unusual opportunities for acquiring a thorough know edge of the distinction which the law makes between pe sonal and real estate. For six years he was an active a influential member of the board of supervisors of Cam bell county. In this capacity he frequently examined wi care the tax lists which are divided into two classes a listed in separate books, one for real estate and the oth for personal property. He was at one time the assessor f his district, lying adjacent to the city of Lynchburg, whi paid at that time about one-half of the taxes gather from the entire county. In this capacity he had to asse separately both real and personal property. His oppo tunities, therefore, for knowing what was meant by t term "personal property" and what was included therei were exceptionally good. His practical knowledge of t subject is further shown by the fact that he listed with t commissioner of the revenue, under the head of person property, to be taxed, $8,500 of the bonds that are now t subject of dispute. It is not conceivable that a man of t testator's large business experience and fine sense wou have given his wife all of his personal property of every d scription, when he had bonds and notes, intending by t use of such broad language to include only tangible pro erty such as household and kitchen furniture. Nor is a reasonable supposition that he intended to include bon

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notes not due in the language, "cash from any money may be to my credit at the time of my death."

ere is no such conflict between the gift to his wife of 0 in cash from any money to his credit, and the gift of s personal property of every description, as to justify interpretation contended for by appellants, which d defeat the manifest intention of the testator. The tor doubtless realized that his wife, who was to have are and support of his younger children, would need ice ready cash, and his purpose was to supply that by providing that out of any money to his credit at ime of his death she should have not exceeding $3,000. rned out that he had to his credit in bank at the time s death little more than one-third the amount named, h is all that his wife can get under that provision. result was probably intentional on the part of the tes- ; at any rate there is no occasion to speculate as to proper disposition of the surplus cash had he left than $3,000 of money to his credit.

e effort to include bonds and notes not due for sev- years after the testator's death in the language "cash any money to my credit at the time of my death" is in accord with common experience. The testator's sense, fine judgment and long and prosperous busi- career forbid the conclusion that he intended by the f the language "cash from any money to my credit at ime of my death" to include as money to his credit s and notes not due.

hen we look to the whole will we find that the testator ks somewhat in detail of his other property which had been devised by the clause under consideration. He orizes his wife to collect the rents and use the same in ng improvements, etc., and in supporting herself and ren and unmarried daughter until the youngest child s of age. He does not refer to the interest from his

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bonds and notes, because the personal property from whi
such income would be derived had already been given
absolute estate to his wife. In the latter part of his w
he was dealing only with the estate left after the gift
his personal property to his wife.

It is very clear from the whole will that the testato
intention was to provide liberally for his wife, who w
charged with the care and support of his dependent ch
dren, and yet if the construction sought to be placed up
his will by the appellants were sound, his wife would ha
far less with which to carry her burden than she wou
have had if her husband had died intestate. Upon th
branch of the case the decree appealed from is witho
error.

It is conceded that the support which the rents had
afford was for the widow, her two children and unmarri
daughter. The decree appealed from gives them this su
port, but goes further and directs that the net proceeds
such rents shall be divided into four equal parts, one
which shall belong to Mrs. Ross and one to each of h
three daughters.

We are of opinion that this provision for support mea
a support according to their station in life, and while fr
the evidence it is not likely that the rents will exceed su
support before the youngest child comes of age, still it
possible that it may do so, in which event the surplus o
a support would have to be preserved for distributi
among all the children when the youngest child reac
maturity. The language of the testator must be regard
and the court was without power to determine now, th
until the youngest child comes of age—some fifteen ye
hence—all the net rents should be applied to such suppo

The decree under review inadvertently holds that
pretermitted child, Verna Ross, is entitled to one-eigh
of the estate, whereas it should have held her entitled
one-ninth thereof, there being nine children.

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The decree appealed from must, therefore, be so modified to provide that the net revenue from rents shall be used Lizzie I. Ross, until her youngest child is of age, for support of herself and three daughters, named in the ree, to the extent that such net rents may be necessary their support according to their station in life; and her modified so as to provide that Verna Ross, the pre-nitted child, shall be entitled to one-ninth of the te. Subject to these two modifications, the decree com-ned of must be affirmed, with costs in favor of the ap-ees as the parties substantially prevailing.

Modified and Affirmed.

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Staunton

SALEM LOAN AND TRUST COMPANY v. KELSEY.

September 11, 1913.

Absent, Keith, P.

1. APPEAL AND ERROR—*Final Judgment.*—A writ of error does not li in an action at law until there has been a final order or judg ment in the cause.
2. APPEAL AND ERROR.—*What Is a Final Judgment.*—A final order i one that disposes of the whole subject, gives all the relief con templated, provides with reasonable completeness for givin effect to the sentence, and leaves nothing to be done in th cause save to superintend ministerially the execution of th order. If it appears upon the face of the judgment that furthe action in the cause is necessary to give completely the relie contemplated by the court, then the judgment is not final.
3. APPEAL AND ERROR—*Final Judgment—Setting Aside a Verdict i Part.*—Where an action is brought upon three notes and ther is a general verdict for the defendant, an order made b the trial court setting aside the verdict as to two of the note and awarding a new trial as to them, but refusing to set i aside as to the other note, and directing that the plaintiff tak nothing by his action as to that note, and that the defendan recover his costs, is not a final order or judgment to which a writ of error will lie.

Error to a judgment of the Law and Chancery Court o the city of Roanoke, in a proceeding by motion unde section 3211 of the Code.

Writ Dismissed.

The opinion states the case.

A. E. King and *Poindexter & Hopwood,* for the plaintif in error.

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S. McNulty, for the defendant in error.

UCHANAN, J., delivered the opinion of the court.

e defendant in error moves to dismiss this writ of as improvidently awarded, upon the ground that no judgment has been rendered in this case.

is is a proceeding under section 3211 of the Code to re- judgment upon three negotiable notes. Upon the of the cause there was a verdict for the defendant. motion of the plaintiff that verdict was set aside as o of the notes and a new trial awarded as to them, he motion to set aside the verdict as to the other note overruled, and an order entered that the plaintiff nothing by his motion as to that note, and that the de- nt recover his costs.

ile by statute an appeal may be taken from certain locutory orders as well as from final decrees, a writ ror does not lie except where there has been a final or judgment in the cause. Pollard's Code, section *Gillespie* v. *Coleman, &c.,* 98 Va. 276, 36 S. E. 377; *y* v. *Provident Trust Co.,* 106 Va. 787, 56 S. E. 738, ases cited.

e general doctrine as to what constitutes a final order, Judge Lewis in *Postal Tel. Cable Co.* v. *N. & W. R.* 87 Va. 349, 351, 12 S. E. 613, 614, is well stated by Minor, who says, "that such an order is one which ses of the whole subject, gives all the relief contem- d, provides with reasonable completeness for giving to the sentence, and leaves nothing to be done in the save to superintend ministerially the execution of der. 1 Minor's Inst. 800."

is statement of the general doctrine as to what consti- a final judgment, order or decree seems to be fully ined by text-writers and adjudicated cases. Sec. 4

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Am. & Eng. Enc. of Law & Pr., 65-6, and cases cited i note. 23 Cyc. 672-3.

In *Burch, Mayor,* v. *Hardwicke,* 23 Gratt. (64 Va.) 5 it was said by Judge Bouldin in delivering the opinion the court, that whether a judgment or decree is final "mus always be ascertained, not by inquiring what ought to hav been done by the court, but by inspecting the terms the judgment or decree and learning from its face what ha been done. If it appears upon the face of the judgment decree that further action in the cause is necessary to giv completely the relief contemplated by the court, then th decree (or judgment) is to be regarded not as final bu interlocutory."

Tested by these well settled principles, it is clear tha the order to which this writ of error was awarded is no final. It appears from the face of the order that the issue as to the larger portion of the demand sued for are sti undetermined, and that as to that portion there is to b a new trial.

It was held in *Wills* v. *Jackson,* 3 Munf. (17 Va) 45 that a plaintiff cannot appeal from a judgment in favor all the defendants except one in a joint action of trespas until the suit has been abated, dismissed or decided as t that defendant. If this be true, it is manifest that a sol plaintiff cannot appeal from a judgment in favor of a sol defendant upon an issue as to the latter's liability on th other two notes remaining undetermined and as to whic a new trial has been awarded. If he could, then instead there being one final judgment in a law case, there coul be as many final judgments as there are separate item in the demand sued for.

The motion to dismiss the writ of error as improvidentl awarded must be sustained.

Writ Dismissed.

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Staunton

TEELE'S ADMINISTRATOR v. COLONIAL COAL AND COKE COMPANY.

September 11, 1913.

Absent, Keith, P.

EGLIGENCE—*Burden of Proof—Personal Injury.*—In an action to recover damages for a personal injury, negligence will not be presumed, but the burden rests upon the plaintiff to prove it affirmatively and by a preponderanec of the evidence.

EGLIGENCE—*Lawful Business—Assumption of Risk.*—No cause of action can arise when an injury results from doing a dangerous but lawful act in a lawful manner. In all such cases the doctrine of "assumption of risk" applies.

ARRIERS—*Riding on Freight Trains—Jerking—Licensee.*—When one takes passage on a freight train, he assumes the risk of such jerking and jarring as are incident to the operation of that class of trains as distinguished from passenger trains. The same rule applies necessarily to one who is riding on such a train as a mere licensee.

AILROADS—*Promulgation of Rules—Licensee—Case at Bar.*—The rule requiring the promulgation of rules for the movement of engines and trains on a railroad yard has no application to a mere licensee on such yard. The railroad company owes him no such duty, but even if it did, the evidence in the case at bar does not show any proximate causal connection between the alleged omission and the injury complained of.

rror to a judgment of the Circuit Court of Wise county n action of trespass on the case. Judgment for the de- ant. Plaintiff assigns error.

Affirmed.

ne opinion states the case.

M. Fulton and *A. N. Kilgore,* for the plaintiff in error.

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Bullitt & Chalkley, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

The following is a summary of the salient facts concern ing the killing of William Steele, to recover damages fo whose death this action was brought.

The defendant, the Colonial Coal and Coke Company prevailed in the circuit court upon a demurrer to the evi dence, and that judgment is now before us for review.

The defendant is a private corporation and operates railroad as an adjunct to its business, extending from it coal mines and coking plant at Dorchester to Dorcheste Junction, three miles away, where a connection is forme with the Louisville and Nashville Railroad and the Inter state Railroad. The defendant is not a common carrier but uses this branch line of railway under the statut which allows a coal company to operate a railroad fro its mines to a junction point with a common carrier. Th Sutherland Coal and Coke Company (which will herein after be called the Sutherland Company) is a private firm of coal operators, and owns a line of railroad from thei plant on Powell's river, a distance of several miles, to point of junction with the defendant's road at Dorchester from which latter point to Dorchester Junction they ru their cars over the defendant's road. Besides its mai track from Dorchester to Dorchester Junction, the de fendant has several switches or yard tracks used in con nection therewith in the immediate vicinity of its cok ovens. The Sutherland Company owned a "dinkey" en gine of about eighteen tons weight, and the defendant's en gine weighed sixty-five tons. There was also a traffic ar rangement between the two coal companies by which th Sutherland Company was permitted to operate its "din key" over the defendant's yard tracks.

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n the day of the accident the dinkey had pushed a car
led with brattice lumber from the plant of the Suther-
l Company to Dorchester to a point where a gondola car
led with cinders was standing on the main track.
reupon the dinkey pushed both cars down the main
k and stopped near the commissary. The big engine
on the main track a short distance below the commis-
, and the crew were under orders to shove the cinder
up the track and switch it off on the cinder track to
mptied. The engineer in charge of the dinkey was ad-
l of the proposed movement and requested to remove
engine up the track beyond the cinder switch. He ac-
ingly raised the lever on the brattice car and placed
position to uncouple that car from the dinkey. Dis-
ring two negroes and Steele in the cab of his engine, he
red them to "unload," and the negroes stepped off. It
not appear whether Steele attempted to get off the
ey or not, but at that juncture (whether immediately
re or after the dinkey was put in motion was not
rly shown, but upon a demurrer to the evidence it must
ssumed to have been afterward) the big engine backed
gainst the cinder car, and the force of the jar was im-
ed to the brattice car and jostled the lever back in
tion, automatically coupling the car to the dinkey,
h moved it several feet up the track, leaving that space
een it and the cinder car. At the time of the impact
le fell from the platform of the dinkey, which was un-
ded, between it and the brattice car and the wheels of
atter passed over his body and killed him. Steele was
mployee of the Sutherland Company (but was not
t its business when he was killed) and such employees
in the habit of getting on the dinkey anywhere it
t be in the yard to ride back from Dorchester to Suth-
nd. This service was rendered free of charge, and
le had boarded the dinkey for his own convenience and

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at a time and under circumstances which must have ma
it known to him that the time had not arrived for t
dinkey to set out on the return trip to Sutherland; nor w
it satisfactorily shown why he remained on the engine aft
he was ordered to "unload" (to get off).

It is undenied that the engineer in charge of the dink
was apprised of the purpose of the crew of the big engi
to couple it onto the cinder car and push it off on the cind
track, and that this was done in the usual way and wi
ordinary care. The speed of the big engine did not exce
one mile an hour, and the force of the impact was not e
cessive, "the bump was very light," less, it was said, tha
is usually incident to coupling cars under like condition
Nor does it appear that those in charge of the big engi
knew of the presence of Steele on the dinkey.

In these circumstances, without considering any oth
phase of the case, it is manifest that the evidence fails
fix actionable negligence upon the defendant. The gener
doctrine is fundamental, that in an action to recover da
ages for personal injuries, negligence will not be presume
but the burden rests upon the plaintiff to prove it affirm
tively and by a preponderance of the evidence. This ru
is nowhere more strongly stated, or more steadfastly a
hered to than in the decisions of this court. *N. & W. R
Co.* v. *Cromer,* 101 Va. 667, 44 S. E. 898; *Consumer's Bre
ing Co.* v. *Doyle,* 102 Va. 399, 46 S. E. 390; *Northingt
v. Norfolk R., &c., Co.,* 102 Va. 446, 46 S. E. 475; *N. & W
Ry. Co.* v. *McDonald,* 106 Va. 207, 55 S. E. 554; *Baugh
v. Harman,* 110 Va. 316, 66 S. E. 86.

No cause of action can arise when an injury results fr
doing a dangerous but lawful act in a lawful manner.
hold otherwise would be to outlaw numerous occupatio
which are essential to the welfare of mankind. In all su
cases the doctrine of "Assumption of Risk" applies. Wh
therefore, one takes passage on a freight train, he assum

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sk of such jerking and jarring as are incident to the tion of that class of trains as distinguished from pas- r trains. 6 Cyc. 625 and cases cited. If this be the with respect to passengers, for whose safety the car- s usually held to the exercise of extraordinary care, *a ri* must it apply to a mere licensee to whom a lesser e of care is due who chooses to ride on a dinkey en- without compensation and for his own convenience.

mplaint is made of the failure of the defendant to have ulgated rules for the movement of engines on its . No such duty was owing from the defendant to a licensee upon its premises, but if it were the evidence not show any proximate causal connection between the ed omission and the injury complained of, as was done e case of an employee in *Va. Iron Coal and Coke Co. re,* 104 Va. 217, 51 S. E. 371.

e judgment is plainly right and must be affirmed.

Affirmed.

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Staunton

STONEGAP COLLIERY COMPANY v. KELLY & VICARS.

September 11, 1913.

Absent, Keith, P.

1. LANDLORD AND TENANT—*Lease—Construction—Intention of Parties.*—The language of a lease which is fairly susceptible of two con structions, is to be taken most strongly against the lessor. Fur thermore, the intention of the parties must be ascertained by reference to the entire instrument and not to disjointed part of it.
2. LANDLORD AND TENANT—*Premises—Collateral and Customary Use—Case in Judgment—Mining Lease—Use of Surface—Building for Employees.*—As a general rule, the lessee of real property is entitled to the use of the demised premises for such collateral purposes as are customary in the use of such property, and for any purpose not prohibited by the lease and not amounting to waste or destruction of the subject matter. In the case in judgment, notwithstanding the isolated statement that the lease was "for the purpose of mining coal and manufacturing coke thereon and therefrom, and selling said coke and coal," looking to the lease as a whole and the customary use of such property, it was the intention of the parties that the lessee should have, for the purpose of its operations, all of the property rights and privileges owned by the lessors in the premises and is not accountable to them for the rents of houses which it caused to be erected on the leased premises in the neighborhood of its operations, and which it leased to another until it became necessary for it to use them for its own employees.

Appeal from a decree of the Circuit Court of Wise county. Decree for the complainants. Defendant appeals.

Reversed.

The opinion states the case.

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ond & Price, Bullitt & Chalkley and *White & Case,* for appellant.

eorge C. Perry and *E. M. Fulton,* for the appellees.

ARRISON, J., delivered the opinion of the court.

his controversy involves the construction and proper rpretation of a certain mining lease entered into be- n the parties thereto on the 17th of July, 1902. The bill filed by the appellees seeking to enjoin the appellant using any of the leased premises for any purpose other that of mining coal, making coke and selling the same, that the appellant be especially enjoined from collect- rents from the Currier Lumber Corporation, such s being claimed by the appellees, and that the appel- be compelled to account to the appellees for all rents, es and profits that it had theretofore received from leased premises by uses foreign to the purpose of the e.

the progress of the voluminous proceedings which wed, the prayer of the bill was granted, perpetually ining the appellant from making the uses of the leased nises complained of, and a final decree was entered rding a money recovery against the appellant for rents id collected from the occupants of certain houses on leased premises.

the view we take of the case we will not stop to con- r the demurrer to the bill, which was overruled, but will eed at once to consider the merits of the controversy. appears that in July, 1902, the appellant leased from appellees a contiguous boundary of land containing roximately 5,700 acres, for the purpose of mining coal, ing coke and selling the same. This body of land is e up of numerous smaller tracts acquired by the lessors

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at different times, and much of it has no mineral value, bu is only valuable for its uses in connection with that par where the mining operations are carried on. It further ap pears that in order to provide in an economical way agains the increasing demand for tenement houses expected t result from the development of the mines, appellant, i November, 1905, entered into an agreement with R. D Benson, trustee, who had large timber and stave mills o an adjacent tract of land, by which it leased to him 5.8 acres of the leased premises and permitted him to erec thereon a number of houses, to occupy the same for period of ten years, paying a nominal rent therefor o $25.00 per year, and at the end of said period the lan and houses to revert to the appellant. In September, 190 the Currier Lumber Corporation, successor to R. D. Ben son, trustee, leased from appellant a number of these house for a period of eight months at $10 each per month. Th right of appellant to make these contracts and derive th benefits flowing from them is the question involved in thi litigation.

The deed of lease is to be regarded in the light of th following well known rules of construction: (1) The lan guage of the contract is to be construed most strongl against the grantor; and (2) The intention of the partie must be ascertained by reference to the entire instrumen and not to disjointed parts of it. 2 Min. Inst. 1056, 105

In *Chamberlain* v. *Brown,* 141 Iowa 546, 120 N. W. 33 the court says: "There is another familiar rule applicabl to cases of this kind that, if the meaning and effect of th lease be fairly capable of two constructions, that will b adopted which is most favorable to the lessee."

"Those things which are appurtenant to a mine wi pass under a lease of the mine as a necessary part thereo although not mentioned in the lease." 27 Cyc. 700. Se also Devlin on Deeds, sec. 863.

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n *City of New York* v. *Interborough R. T. Co.*, 125 N. App. Div. 437, 109 N. Y. Supp. 885, the court says: is is a recognition of the right of the lessee to use the ised premises for such collateral purposes as such prop- might be customarily used. A lessee of real property ntitled to the exclusive use of the demised premises for purpose not prohibited by the lease, not amounting to te or destruction of the subject matter. This is the ral rule."

The grant of a thing passes the incident as well as the cipal, though the latter only is mentioned; and this ot be avoided without an express reservation. . . . ant of a thing will include whatever the grantor had er to convey, which is reasonably necessary to the en- ent of the thing granted." *Riddle* v. *Littlefield*, 53 ., 16 Am. Rep. 388.

he first clause of the lease provides as follows: "The rs hereby lease to the lessee, its successors and assigns, the purpose of mining coal and manufacturing coke eon and therefrom, and selling said coke and coal, the wing tracts or boundaries of coal lands or coal rights surface rights owned by the lessors near the town of , Wise county, Virginia." Then follows the descrip- of eighty-six different tracts or parcels of land, some of h were owned in entirety by the lessors and as to rs they only owned the coal and other minerals, to- er with certain mining rights and privileges, and as to rs they only owned the surface. This description of several properties is followed by the following clause: of the rights and privileges which have been granted he various grantors hereinbefore named to either the Kelly or said Vicars, or by any other grantor or tors, to them or either of them for any of the land, coal, ace, or mining rights and privileges, hereinbefore speci- y described and not herein excepted or reserved, and

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which the said lessors now own shall pass to the less under this lease; but it is understood that the said lesso have heretofore sold and conveyed divers tracts, pieces parcels of surface to various persons, which were convey to them by the aforesaid grantors and all of which a reserved from the operation of this lease."

These provisions of the lease constitute all that is e sential to be considered in its construction. It seen clear that, under these provisions, the surface rights own by the lessors are granted to the lessee, certainly all of su rights passed from the lessors. In other words, the who of the properties owned by the lessors passed to the lesse together with all rights and privileges appurtenant ther to. If it was the intention of the parties that the less should have, for the purpose of its operations, all of t property, rights and privileges owned by the grantor more apt language to accomplish that purpose could har ly have been employed than that of the two provisions the deed which have been mentioned. There are no cov nants in the deed restraining the beneficial use of t premises granted, and it is obviously inconsistent with t principles upon which a court of equity acts to raise implication a covenant in restraint of a beneficial use property. A covenant that premises shall be used by a le see for a particular specified purpose does not implied forbid that they may be used for a similar lawful purpo which is not injurious to the landlord's rights, unless su other use is expressly forbidden. *Reed* v. *Lewis,* 74 In 433, 39 Am. Rep. 88; *San Antonio Brewing Asso.* v. *Brent* 39 Tex. Civ. App. 443, 88 S. W. 368.

The law on the subject is stated as follows in 24 Cy 1046, citing numerous cases: "The general rule is that t the lease of a building everything which belongs to it, or used with and appurtenant to it, and which is reasonab essential to its enjoyment, passes as incident to the prin pal thing and as a part of it unless specially reserved."

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nd again at page 1061: "Where the contract of lease
lent on the subject, the lessees have, by implication,
ight to put the premises to such use and enjoyment as
please, not materially different from that in which
are usually employed, to which they are adapted and
hich they are constructed. The law, however, implies
bligation on the part of the lessee to use the property
proper and tenant-like manner, without exposing the
lings to ruin or waste by acts of omission or commis-
and not to put them to a use or employment material-
fferent from that in which they are usually employed,
pparently violative of the spirit and purpose of the
as such spirit and purpose is evidenced by the recitals
ein."

ppellees rely on the alleged implied restriction, that
remises are not to be used for any purpose except "for
ng coal, and manufacturing coke, and selling such
and coke," the contention being that this disjointed
ence raises an implication that the use to be made of
remises and especially the use to be made of the sur-
is so limited that the lessee cannot make the use there-
at is denied to it in this case by the appellees.

it were permissible for a court of equity, in the light
e priciples we have cited, to raise by implication a
nant restraining the beneficial use of property, it would
ecessary, the deed being silent on the subject, to in-
e as to the manner in which premises leased for such
oses are usually employed. The record shows that the
to which such premises are necessarily put are so ex-
ed as to be difficult of mention in detail. It abund-
y appears from the testimony of numerous coal opera-
men of wide experience in this and other coal fields
Vest Virginia and Pennsylvania, that it is usual and
mary for the lessee to have the possession, control
se of the surface of the leased premises, and especially

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that adjacent to the operation, for all purposes. This
necessary, as shown, for many reasons both affirmative an
negative. It is necessary for coal operators to buil
numerous tenement houses for their employees, store
warehouses, office buildings, hospitals, supply house
hotels and boarding houses, tipples for loading coal, crus
ing plants, side tracks, tram roads, motor roads; to ere
tanks, dig wells, lay pipes; to have gardens and pastur
both for themselves and employees, and many other righ
and privileges depending on local conditions. Control
the surface is necessary to enable the operators to keep o
persons engaged in selling whiskey, to keep off as far
possible disreputable women and labor agitators. Thes
among others too numerous to mention in detail, are th
purposes to which the coal operator must put the lease
premises and the right to so use such premises is nece
sarily incidental to the lease. Jones on Landlord and Te
ant, sec. 382; Taylor on Landlord and Tenant, sec. 16
24 Cyc. 1061.

It is to be further observed that the action of the parti
is significant as showing their intention, and that the co
struction of the lease now contended for by the appelle
is not warranted. It appears that a large part of th
leased premises known as the Carter tract, part of whic
is the land in controversy in this suit, is cleared and ha
no mining timber upon it and no coal underlying it, an
yet it was regarded as so important to the leased premis
that the appellant before consummating the lease require
the appellees to purchase the tract and include the same i
the lease. This was manifestly not done for the purpo
of mining coal or cutting timber from such land, for it wa
known that neither was there, but only because it wa
regarded as necessary for the lessee to have control of th
surface in connection with its contemplated coal and co
operations. Its purchase and inclusion in the lease woul

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ve been a vain and useless thing unless the lessee could
e the surface thereof in such manner as seemed to it best
furthering the success of its enterprise.

It further appears that the lessors made no objection to
e erection of the houses in controversy on the leased
emises, nor have they ever made any expenditure either
building the houses in controversy, or for keeping up
pairs or paying the insurance and taxes thereon. The
uses were built under an arrangement made by the lessee
the purpose of providing tenements for its employees
en needed. If under these circumstances the lessors
re entitled to the rents of the houses, they would be en-
led to the possession, and if so, they would seem to have
equal right to enter and take possession of any other
use of the lessee which was not at the time being occu-
d by an employee connected with its mining operations.
ch a right would be repugnant to the letter as well as the
rit of the lease, and such a narrow construction of the
se, if carried to its logical conclusion, would impede and
organize, if not entirely stop, the operations of the
see.

In conclusion we are of opinion that the appellant was
inly within its rights in having the houses in contro-
sy erected under the arrangement pointed out, and in
ting them to the Currier Lumber Corporation until it
ame necessary for appellant to use them for its own em-
yees; and, further, that appellant was under no ob-
ation to account to the appellees for the rent of such
uses arising from their occupancy by the Currier Lumber
rporation or anyone else.

The decree appealed from must, therefore, be reversed,
d this court will enter such decree as the circuit court
ould have entered, dissolving the injunction in favor of
appellees and dismissing their bill with costs.

Reversed.

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Syllabus.

Staunton

SOUTH ATLANTIC LIFE INSURANCE COMPANY v. HURT'S ADMINISTRATRIX.

September 11, 1913.

Absent, Keith, P.

1. LIFE INSURANCE—*Suicide—Burden of Proof—Circumstantial Evidence of Death.*—Where the defense to an action on a life insurance policy is that the defendant committed suicide, the burden is upon the defendant to show by clear and satisfactory evidence that the insured did actually commit suicide. A mere preponderance of the evidence is not sufficient. The mere fact that the body of an insured is found with a pistol in his hand and a bullet wound in his head is not sufficient to prove suicide. When the evidence of self-destruction is circumstantial, the defendant fails unless the circumstances exclude with reasonable certainty any hypothesis of death by accident.
2. SANITY—*Presumption.*—Every man is presumed to be sane until the contrary is shown, and the burden is upon the party alleging insanity to prove it.
3. SANITY—*Insane Relatives—Presumption.*—Where no word or act on the part of a person whose sanity is questioned is shown, the fact that he has had insane relatives, standing alone, raises no presumption of insanity.
4. LIFE INSURANCE—*Suicide—Question for Jury.*—Where the suicide of the insured is the issue in an action on life insurance policy and the proof (while tending to show suicide) does not exclude with reasonable certainty, death from accident, it is proper to leave to the jury to say whether or not it was a case of suicide as the burden on such issue is on the defendant.
5. LIFE INSURANCE—*Evidence—Cause of Death—Physician's Certificate—Harmless Error.*—In an action on a life insurance policy it is not error to exclude from the jury the sworn statement of the attending physician in a proof of death as to the cause of death of the insured where death resulted from a gun-shot wound, and the physician knew no more about what caused it than anyone else who saw the dead body. But, even if such ex

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clusion was error, it was harmless in the case at bar, as the physician was subsequently put upon the stand, and all he knew upon the subject was put completely and effectually before the jury.

LIFE INSURANCE—*Fraudulent Answers—Physical Diseases—Insanity—Case at Bar.*—Untrue answers to questions propounded on an application for a life insurance policy, in order to be fraudulent, must be wilfully false. In the case at bar, the collocation of the question, "Have any of your uncles or aunts had consumption, or any hereditary disease?" would seem to indicate that the inquiry was directed to physical diseases, and not to diseases of the mind, as insanity.

LIFE INSURANCE—*Medical Examiner—Agent of Insurer—Knowledge.* The medical examiner of a life insurance company who writes in the application the answers of the applicant for the policy to the questions propounded to him is the agent of the company, and the company is bound by any information he has at the time he fills out the application for the insured. In the case at bar, the medical examiner of the company was thoroughly familiar with all the facts as to which it is alleged the insured made false answers.

Error to a judgment of the Circuit Court of Tazewell nty in an action of assumpsit. Judgment for the plain- Defendant assigns error.

Affirmed.

The opinion states the case.

Henry, Graham & Hawthorne and *Thos. B. Gray,* for the intiff in error.

Greever & Gillespie and *Chapman & Gillespie,* for the endant in error.

HARRISON, J., delivered the opinion of the court.

Ollie L. Hurt, administratrix of John B. Hurt, deceased, overed a judgment against the South Atlantic Life Inance Company in the circuit court of Tazewell county $5,000, the amount of a policy of insurance issued by

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the defendant company upon the life of the plaintiff intestate; and upon the petition of the company this judgment is now before us for review.

Upon the trial of the case the defendant company interposed the plea of non assumpsit and a special plea of tender of the plaintiff $27.30, being the amount of reserve fund held on account of the contract sued on, which it claimed was all that was due under the policy. Being required to file a statement of its grounds of defense, the company made two contentions: First, that the insured, during the first twelve months from the date of the policy, committed suicide; and, second, that the insured made in his application for insurance untrue answers to certain questions which were material to the risk contracted for in the policy thereby voiding the same.

From the evidence adduced it can be stated with confidence that at the time the policy in question was issued the insured was in good health, and that the application was made and the policy accepted by him in good faith. The evidence as a whole reveals the insured as a man of the highest integrity, of unsual business ability, possessed of large real and personal property, actively engaged in the successful prosecution of extensive business interests, with a large and happy family consisting of his wife and eight children, to which he was attached and in which he took great pride. Up to the time of his death he was full of plans for the future, with every confidence in his ability to carry them through successfully, with nothing to trouble him in any of his affairs, either in business or in his personal relations.

These were the conditions of the insured and the circumstances surrounding him up to the morning of January 26, 1911, when he left his home with two of his work hands to feed his cattle. After the cattle were fed he directed his men to return to the house, saying that he would re-

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"to watch the hogs away from the cattle." Failing
turn to his home that day, search was instituted, and
lead body was found on the following morning in a
ire some distance from his home, death having been
ed by a gun-shot wound in his temple. The body was
l in an adjoining field to that in which the cattle had
fed, at the foot of a stump, lying on the left side with
eet partly drawn up. The left arm and hand were
r him, and the right arm thrown across his body with
ight hand resting upon the butt of a .38 calibre pistol,
h showed that one chamber was empty. The deceased
shown to have owned a pistol which was not found
his death.

hile two grounds of defense were set out by the de-
ant company, the record discloses that the real con-
was that the insured committed suicide within twelve
hs after the date of the policy. The great weight of
ority, both text-writers and decisions, agrees that in
se of this kind the burden is upon the defendant to
by clear and satisfactory evidence that the insured
ctually commit suicide; that a mere preponderance
idence will not suffice.

the case of *Cosmopolitan Life Ins. Co.* v. *Koegel*, 104
19, 52 S. E. 166, it is held that "The defense of suicide,
ail, must exclude every hypothesis of accidental death.
party making the defense has the burden of proof.
ll not be presumed. The mere fact that the body of
sured is found with a pistol in his hand and a bullet
d in his head is not sufficient to prove suicide."

that case, quoting with approval from high authority,
urther said: "Accidental death will be presumed, and
presumption must be overcome by the proof of facts
h exclude every hypothesis of death except by suicide."
further, that "when the evidence as to whether death
ccidental or suicidal leaves the question in doubt, the
mption is in favor of accident."

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The doctrine laid down in the *Koegel case, supra,* is adhered to and emphasized by this court in the subsequent cases of *Life Insurance Co. of Va.* v. *Hairston,* 108 Va. 832, 62 S. E. 1057, 128 Am. St. Rep. 989, and *Metropolitan Life Insurance Co.* v. *DeVault,* 109 Va. 392, 63 S. E. 982.

In the last-named case it is said: "When the evidence of self destruction is circumstantial, the defendant fails unless the circumstances exclude with reasonbale certainty any hypothesis of death by accident."

The principles announced in the Virginia cases prevail with unanimity in numerous cases in point from other jurisdictions where the defense of suicide is sought to be established by circumstantial evidence. Of these we shall refer to but one.

In the case of *Leman* v. *Manhattan Life Ins. Co.,* 46 La. Am. 1192, 15 South 389, 24 L. R. A. 589, 49 Am. St. Rep. 349, the suit was brought by a widow on a policy issued on the life of her husband. The jury found for the defendant on the defense of suicide, and on appeal the judgment upholding that verdict was reversed and a judgment entered in favor of the plaintiff for the amount of the policy. The facts were not unlike those in the case at bar, so far as the circumstances tending to support the theory of suicide were concerned. Briefly stated, the body was found with a wound from a gun-shot causing death; the discharged pistol was wedged as if it had been forced on the right hand; the body was reclining on a sofa, as of one sleeping, the left arm rested on the breast, the right leg crossed on the left, the head in the usual position of one in repose, there being no evidence of any convulsive movement. The court said: "The question is whether these appearances point to suicide, to the exclusion of any other cause? Why not, with equal potency, to accidental death or death by the hand of another? . . . When, as in this case, circumstantial evidence alone is relied on to estab-

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suicide, it is at least within bounds to say the evidence
be of a character to exclude, with reasonable cer-
y, any other cause of death. If the evidence falls short
is exaction, the suicide is not proved. The fact of
h remains, and that casts the liability on the company
ring against death, with the excepted case of self de-
tion, which the company fails to establish. This ap-
iation of the evidence and the burden of proof con-
ns us to set aside the verdict and judgment of the
r court in favor of the defendant."

the case at bar the defendant company seeks to avoid
urden of proving that the insured committed suicide
ttempting to show that he was insane at the time of
leath, and that therefore the presumption against sui-
never existed. Here again the defendant is confronted
another presumption, namely, that all men are pre-
ed to be sane until the contrary is shown and the bur-
is upon the party alleging insanity to prove it. *Howard*
oward, 112 Va. 566, 72 S. E. 133.

ne record fails to show one word or act of the insured
the moment he was last seen to remotely suggest that
as insane. When last seen on the day of his death he
in his usual health and engaged, as usual, in the per-
ance of his daily duties. It is true that the mother
certain relations of the insured are shown to have
insane, but it does not follow from this that the in-
l was insane. The result of the testimony of the ex-
s in this case is that when the acts and demeanor of a
on indicate insanity, the fact that he has had insane
ives strengthens the view that he is insane, but where
ord or act on the part of the person whose sanity is
tioned is shown, the fact that such person has had
ne relatives, standing alone, raises no presumption of
ity. A critical reading of the record fails to disclose
demeanor, act or word on the part of the accused, at

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any time, indicating that he was insane, and therefo the fact that he was shown to have had insane relative standing alone, does not prove that he was insane at t time of his death. Apart from the insanity of relatives, t only other circumstance relied on by the defendant tending to show that the insured was insane, is that cently before his death he had lost flesh and was le talkative and jovial than usual. The experts agree th while these circumstances may be present in cases of i sanity, they do not, standing alone, indicate that a pers is insane. They may and often do arise from many phys cal causes having no relation whatever to the disease insanity.

In concluding this branch of the case it is sufficient say that, even if it be conceded that there is greater prob bility that the death of the insured resulted from a su cidal act than from an accident, still we cannot say th death by suicide is the only reasonable conclusion to drawn from the evidence. The proof does not exclude, wit reasonable certainity, death from accidental shooting, an the burden being upon the defendant to establish its d fense by proof, it was properly left to the jury to sa whether or not it was a case of suicide.

In the first assignment of error petitioner complains the exclusion of the affidavit made by Dr. Baylor whe the proof of death was made out, the point relied on bein that petitioner was entitled to the benefit of his answer to the special cause of the insured's death, the answe being: "Know of nothing unless it be hereditary insanity.

The statement of the attending physician in a proof death would seem to be only necessary or valuable whe the deceased has died from natural causes and has a tually been attended by a physician. In such a case th insurance company has a right to know what the physicia knows as to the cause of death. But in this case there wa

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ttending physician, and the answer of Dr. Baylor, h is mere conjecture, shows that he knew no more t what caused the death than anyone else who saw dead body. But be that as it may, Dr. Baylor was equently introduced as a witness by the defendant interrogated fully on this point, as to what he knew of leceased in every way, and what he meant by the lan- ge of the answer he gave in the affidavit mentioned. that he knew was thus put completely and effectually re the jury and the defendant suffered no prejudice tsoever from the action complained of.

he second assignment of error is to the action of the uit court in refusing to give certain instructions asked y the defendant company, and in giving certain other ructions. The court's refusal to give instructions "A" "C," asked for by the defendant and refused, may be t with together.

his application for the policy sued on the insured asked the following question: "Have any of your es or aunts had consumption or any hereditary dis- ? If so, on paternal or maternal side?" To which nsured replied "No." Instruction "A" told the jury this answer was false and that it was material to risk, and directed the jury to find for the defendant. ruction "C" told the jury that if the insured, in answer- the question mentioned, failed to disclose that his e, A. J. McGuire, had been afflicted with hereditary in- y, they must find for the defendant.

hese instructions were properly refused. The policy ides for two defenses only, namely, suicide within ve months from the date of the policy and fraud. Un- answers, in order to be fraudulent, must be wilfully . *Mason* v. *Chappell,* 15 Gratt. (56 Va.) 582, settles aw in Virginia that the *scienter* must be shown. There o evidence that the applicant for this insurance knew

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that he had "uncles or aunts" who had been the victi
of hereditary insanity. He doubtless knew that he h
relatives who had been insane, but that this layman kn
the characetr of their insanity is not to be presumed wh
learned experts who have testified in this case differ as
the hereditary nature of insanity, all agreeing that certa
kinds of insanity are not hereditary. When the docto
differ as to the hereditary nature of insanity, it is hard
to be expected that a layman, unlearned in the tecni
meaning of medical terms, would know whether or n
a particular case of insanity was hereditary. Further, t
form of the question was well calculated to mislead t
applicant. He was asked a number of questions as
his physical and mental condition, and immediately p
ceding the question and answer under consideration
was asked: (16) "Is any intimate associate, or any pers
in your immediate family or household now ill will c
sumption?" (17) "Has any one of them recently been
or died of that disease?" (18) "Have any of your unc
or aunts had consumption, or any hereditary disease
This last question, certainly in view of those immediat
preceding, would naturally have been regarded by the
plicant as referring wholly to physical diesases, and
would be most natural for a layman to understand from
question that hereditary diseases of a like nature w
referred to. Dr. Williams, the medical examiner for t
company, who wrote out the answers of the applicant
these questions, when asked the meaning of the term "g
health," said: "In the usual acceptation of the term, y
would have reference to the physical condition." T
witness is shown to have been, at the time, fully inform
as to the family history of the applicant, and particula
as to the mental condition of his mother, uncles and aun
and in answer to the question, "Were those answers
you wrote them, and made by Mr. Hurt, true at the ti

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y were made?" he says: "So far as I know they were." does not seem reasonable to suppose that the defendant ended, by the question under consideration, to include ntal trouble in the language "consumption or any he- itary disease." If it did, it has only succeeded in mak- an erroneous impression upon the applicant and mis- ding him into ignorantly making the answer now com- ined of.

Apart, however, from these considerations, it appears t Dr. Williams, the medical examiner for the defendant npany, who wrote out the answers of the deceased in application for this policy, was well acquainted with mother, uncles and aunts from his early boyhood, and thoroughly familiar with their mental condition. It well settled principle that any knowledge which the nt of an insurance company may have is imputed to the npany, and that medical examiners for insurance com- ies are considered as agents for the company and the npany is bound by any information its medical examiner have at the time he fills out the application for the ired. *Johnson* v. *Aetna Ins. Co.*, 123 Ga. 404, 51 S. E. 107 Am. St. Rep. 92.

here is a very lengthy and luminous note to this case he American State Reports in which it is said, citing nerous authorities in support of the proposition, that e principle stated applies equally to medical examiners ointed by life insurance companies, though the appli- on or policy may declare that such is not the case; for miners are in law agents of the corporations selecting n and requiring the performance of their duties, in- ling the asking of questions and the writing in the lication of the response thereto. Hence, though a medi- examiner omits an answer made by the applicant, or tes it out substantially different from the response ac- lly given by him, and the insurer acts only on the an-

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swers so written, still, as in law the medical examiner the agent of the insurer and not of the insured, the form cannot escape liability on account of the failure of its me ical examiner to perform his duty, nor even on account his intentional misperformance of it. He is the agent the insurer, and to it his knowledge is imputed, and if issues its policy, it must be deemed to have done so aft its agent had communicated to it all the facts made know to him, and it is estopped from contending to the contrary

The defendant company, therefore, knew or could ha had through its medical examiner all the information th it now claims to have desired to elicit by the question und consideration, and it is estopped from contending to t contrary.

Instruction "B" asked for by the defendant tells t jury that the plaintiff's intestate committed suicide a peremptorily directs them to find for the defenda Enough has been already said to show the fallacy of th instruction, and that it was properly refused.

The petition points out no error in the instructions giv by the court, and an examination of them shows that th are free from objection.

The case having been fairly submitted to the jury, the verdict must, under the law, stand and the judgment u holding the same be affirmed.

Affirmed.

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Staunton

TATTERSON'S EXECUTRIX v. FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

September 11, 1913.

Absent, Keith, P.

1. CONTRACTS—*Building Contract—Performance—Damages—Case in Judgment—Principal and Surety.*—A contractor gave bond with surety to build and complete a building according to certain plans and specifications. After partially fulfilling his contract, he gave up the job, and the owner let the completion of the building to another contractor for the balance agreed to be paid the first contractor. The second contractor gave the same surety for the performance of his contract that was given by the first contractor. The work was completed by the second contractor at a considerable loss, which was made good to him by the surety aforesaid. The surety thereupon sued the first contractor to recover the amount of the loss paid as aforesaid. The first contractor had nothing to do with the making of the contract for the completion of the unfinished building, and, in fact, knew nothing of it.

Held: The first contractor is in no way liable for the loss sustained by the second contractor, which was voluntarily paid by the common surety on the two bonds.

Appeal from a decree of the Court of Law and Chancery of the city of Norfolk. Decree for the complainant. Defendant appeals.

Reversed.

The opinion states the case.

R. R. Hicks, for the appellant.

J. W. Harper and *Frank L. Crocker,* for the appellee.

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CARDWELL, J., delivered the opinion of the court.

On the 9th day of June, 1909, Elbert Tatterson, a ge
eral contractor doing business in the city of Norfolk, Va
entered into an agreement with the building committ
of the Young Men's Christian Association of said cit
by which he agreed to erect and complete for said ass
ciation a building at a certain designated point in the cit
at the price of $126,332. Article 5 of the contract provide
among other things, as follows:

"Should the contractor at any time refuse or fail
prosecute the work with promptness and diligence, or fa
in the performance of any of the agreements herein co
tained, such refusal, neglect or failure being certified by t
architect, the Young Men's Christian Association shou
be at liberty, after three days written notice to the co
tractor, to provide any such labor or materials, and
deduct the cost thereof from any money then due or ther
after to become due to the contractor under this contrac
and if the architect shall certify that such refusal, negle
or failure is sufficient grounds for such action, the own
shall also be at liberty to terminate the employment of t
contractor for the said work and to enter upon the pre
ises and take possession, for the purpose of completing t
work included under this contract, of all materials, too
and appliances thereon and to employ any other person
persons to finish the work, and to provide the materia
therfor; and in case of such discontinuance of the emplo
ment of the contractor, the contractor shall not be entitl
to receive any further payment under this contract unt
the said work shall be wholly finished, at which time if t
unpaid balance of the amount to be paid under this co
tract shall exceed the expense incurred by the owner
finishing the work, such excess shall be paid by the own
to the contractor; but if such expense shall exceed suc

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aid balance, the contractor shall pay the difference he owner."

he building committee of the Y. M. C. A. required terson to give a bond in the sum of $63,166.00, con- oned for the faithful performance by him of the con- ct, and accordingly, on July 3, 1909, he made applica- n to the Fidelity and Deposit Company of Maryland reafter spoken of as the bonding company) to become ety on his bond for that amount. Pursuant to the rules l regulations of the bonding company, Tatterson filed h his written application a statement of his assets, ch statement showed that among other property he ned real estate in the city of Norfolk at the corner of tain designated streets which he valued at $10,000 sub- to a deed of trust for $1,400.

n the faith of this statement, it is claimed, the bonding npany became surety on his said bond, which was made able to the Y. M. C. A. of Norfolk, Va., and was con- oned for the faithful performance of Tatterson's con- ct to erect and complete said building.

atterson entered upon the performance of his contract l continued the work thereon until about December 27, 0, on which date he wrote a letter to the Building Com- tee of the Y. M. C. A. which is as follows:

ntlemen:

Owing to ill health, which, as you know, has for some ks kept me confined to my room, and fearing that it l be some time before I will be able to get out and go work again, I have concluded that I ought to abandon contract for the construction of the Young Men's ristian Association building, at the corner of Granby l Freemason streets in this city, and accordingly there- abandon the same.

This is without prejudice to either your right or mine to the various questions which have been raised by each e during the construction of this building."

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On the receipt of this letter the building committee replied by letter, saying that they acknowledged that he (Tatterson) had abandoned the contract upon the conditions stated in his letter, and on the same day the bonding company was notified by a letter of the attorney for the Y. M. C. A. that Tatterson had abandoned his contract, and called upon the bonding company to comply with the terms of their bond and to make the necessary arrangements for the completion of the building. Before this, as it also appears, the chairman of the building committee on December 6, 1910, had written to the bonding company advising it that the work on the building had been at a standstill for some time, and notifying it that unless the work progressed more rapidly they would exercise the right they had under the contract to direct Tatterson to cease work on the building and call upon the bonding company to complete the contract.

Upon receipt of the letter from the counsel for the Y. M. C. A. of date December 27, 1910, the bonding company sent its representative to Norfolk, who made an investigation of the situation, and among other things it was ascertained that there would be a balance of $52,384.53 due Tatterson on the completion of the building, which balance was subject, however, to the claims of various mechanics and supply men who had filed liens or were about to do so. The bonding company had theretofore been advised that the building could not be completed with the balance that would be due Tatterson as per the contract. The bonding company did not, in accordance with its right under the terms of the bond, take charge of the building and complete it, nor did it sub-let the contract, but after some negotiations with the authorities of the Y. M. C. A., on January 16, 1911, a contract was entered into between Morrow Bros., contractors of Baltimore, Md., and the Y. M. C. A. whereby Morrow Bros. agreed to complete the building

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the amount which would have become due to Tatterson the completion thereof, viz., $52,384.53, and further- e agreed to assume the payment of all valid claims for ch liens could be filed against the building. In addition his Morrow Bros., contemporaneously with the execu- of the said contract, executed a bond in the penal sum 54,000 to the Y. M. C. A. conditioned upon the faithful formance of their duties under the contract, with the bonding company as surety, which bond was similar ts provisions to that executed by Tatterson above re- ed to. It further appears that Morrow Bros. were con- tors who sometimes represented the bonding company ompleting buildings which had been abandoned by con- tors for whom the bonding company might be surety, n the bonding company took charge of the work of com- ing the building and that the bonding company would nburse them for any losses.

he building was completed by Morrow Bros., at a total of $73,169.26, and after crediting on this the amount of ,716.25 which they had received from the Y. M. C. A., which Tatterson would have received had he completed building, their net loss was $20,453.01.

t further appears that on April 1, 1909, Lizzie M. Tat- on, the wife of said Elbert Tatterson, executed a deed, ch she acknowledged before a notary public on April 1909, whereby she conveyed to her said husband five of land in the city of Norfolk and fully described in deed, which it is claimed by the bonding company was cuted by her for the purpose of enabling Tatterson to ain the bonding company as surety on his bond for the formance of his contract with the Y. M. C. A., and the estate conveyed thereby is the same described as part is assets in his written application to the bonding com- y to become his surety. The said deed from Lizzie M. terson to her husband was never recorded, but when

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Charles A. Morrow, of the firm of Morrow Bros., came t Norfolk and took charge of the work of completing th building of the Y. M. C. A. he saw the deed on three di ferent occasions in Tatterson's safe, which was in his o fice in the Dickson Building. It is claimed that Tatterso knew that Morrow Bros. were representing the bondin company in the completion of said building, and afte Charles A. Morrow had entered upon this work he went t Tatterson's house and endeavored to induce him to giv the bonding company some security for the loss that woul be sustained in completing the building, which, as it woul seem from Charles A. Morrow's statement, Tatterso agreed to do, and furthermore agreed to give a deed o trust on the specific real estate which his wife had conveye to him to secure the bonding company against possible los or to raise money with which to pay such loss, but thi was never consummated.

Tatterson died at his home in Norfolk on February 2 1911, and a day or so after his death the said deed referre to was missing from the safe in his office. In June, 191 the attorney for the bonding company had an intervie with Mrs. Tatterson, and requested her to deliver up th deed in question so that it could be recorded and the prop erty conveyed thereby subjected to the payment of the los sustained by the bonding company in completing Tatte son's contract; but she, though admitting that she ha the deed, declined to have it recorded, or to reimburse th bonding company for the loss sustained by it. Thereupo the bill in this cause was filed by the bonding compan against the said Lizzie M. Tatterson, in her own right an as executrix of the last will and testament of her decease husband and others, for the purpose of establishing th claim asserted by the complainant against the estate o Tatterson for the amount of the loss alleged to have bee sustained in the completion of said building and of sub

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ng for its partial satisfaction the property conveyed
m from his wife by said deed.
on a hearing of the cause on the pleadings and the
nce adduced by the respective parties, the court below
ed its decree of April 12, 1912, establishing the claim
e bonding company against the estate of Tatterson for
53.01, and adjudging that Tatterson died siezed and
ssed of the real estate mentioned and described in the
in question from Lizzie M. Tatterson, his wife, to him,
that this real estate was assets for the payment and
faction of the claim of the bonding company. From
decree Lizzie M. Tatterson, in her own right and as
itrix of her deceased husband, has taken this appeal.
e contentions of the appellant are: First, that the
ing company sustained no damages by reason of its
yship for Elbert Tatterson, her husband, because El-
Tatterson partially erected the building of the Y. M.
., and Morrow Bros. agreed to complete it for the un-
contract money, so that Elbert Tatterson's contract
absolutely fulfilled; and, if the bonding company lost
hing, it was by reason of its suretyship for Morrow
. rather than its suretyship for Elbert Tatterson;
nd, that even if the claim asserted by the bonding
pany be valid, still the real estate sought to be sub-
d to its satisfaction was never the property of Elbert
erson, and, therefore, is not assets of his estate f
payment of his debts.
the view we take of the case, it is only necessary to
ider appellant's first contention, since if there be no
lity upon the estate of Elbert Tatterson, deceased, for
claim asserted by appellee there can be none therefor
the individual property of appellant sought to be sub-
d to the partial satisfaction of said claim.
has been observed, the appellee, the bonding company,
not in accordance with its right under the bond exe-

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cuted by Tatterson to the Y. M. C. A. take charge of
partially completed building in question and complete
nor did it sub-let the same; on the contrary, Morrow Br
on January 18, 1909, after full investigation as to the c
dition of the work on the building and ascertaining t
there was a balance of $52,384.53 due Tatterson on its c
pletion, which balance was subject, however, to the cla
of various mechanics and supply men, who had either fi
liens or were about to do so, entered into a new and in
pendent contract with the Y. M. C. A., similar in all
details to the contract between Tatterson and the Y.
C. A., by which Morrow Bros. agreed to complete said bui
ing at the price of $52,384.53, and furthermore agreed
assume the payment of all valid claims for which li
could be taken against the building. Contemporaneou
with the execution of the contract, Morrow Bros. execu
a bond in the penal sum of $54,000 to the Y. M. C. A., c
ditioned upon the faithful performance of their dut
under the contract with the appellee as surety. With
making or entering into this contract Tatterson had no
ing to do, and in fact knew nothing of it, so far as
record discloses. There is some evidence that Tatterson
an interview with one of the firm of Morrow Bros. and
torney Shultice recognized that, as he had abandoned
contract, there was a liability upon him for a possible l
that might be sustained by appellee if it undertook to co
plete the contract, and expressed a willingness to provi
indemnity against such loss, but nothing was done
furtherance of this suggested course, and instead Morr
Bros. agreed with the Y. M. C. A. and appellee to take
the work of completing the building of the former as
the terms of Tatterson's contract, and for the contra
price remaining unpaid by the Y. M. C. A., and for
faithful performance of this contract on the part of M
row Bros. appellee became their surety. The fact th
Morrow Bros. lost instead of made money on their c

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t, which loss appellee chose to make good, does not alter case. The Y. M. C. A., as appellant contends, had no t against appellee, save such as accrued out of the ty's bond, executed to it by Tatterson. They were en- d to and needed no other contract than the one they al- y had upon which they are asserting no claim, and n Morrow Bros. undertook to complete the building for amount of money that would have gone to Tatterson he completed it, they did so, not only with the assent ie Y. M. C. A. and appellee, but after careful inquiry investigation and in the belief that they could profita- complete the building at that price. Had it cost Mor- Bros. less to complete the building than the price ed on between them and the Y. M. C. A., they would realized a profit as they had expected, and it would been theirs, and no one could have sustained a claim ehalf of Tatterson's estate for any part thereof. The it on their contract, if it had been realized by Morrow s., would have been theirs, and the loss sustained by they must, of course, bear so far as Tatterson's estate ncerned; and the fact that appellee volunteered, as it ars, to make good this loss to Morrow Bros., gives it ight whatever to recover the amount so paid of Tatter- s estate for which it is not in any respect liable.

e are of opinion, therefore, that the decree appealed , in so far as it establishes the claim asserted by ap- es as a liability upon the estate of Elbert Tatterson, ased, and adjudges that certain real estate of the ap- nt, held in her own right, is liable for the partial pay- t of the said claim, is erroneous, and the decree in this ect is reversed and annulled, with costs to appellant; the cause, which has, upon petitions filed therein by ain creditors of Elbert Tatterson, deceased, become a ral creditor's suit for the settlement of his estate, is nded for further proceedings therein not inconsistent the views expressed in this opinion.

27 *Reversed.*

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Staunton

VIRGINIA COAL AND IRON COMPANY v. HYLTON AND OTH

September 11, 1913.

Absent, Keith, P.

1. DEEDS—*Severance of Surface and Minerals—Deed by One Tenant.*—While the general owner of land may grant any o of the underlying minerals and remain the owner of the sur or may grant the surface, reserving any or all of the underl mines, and thus sever the title of the surface and the u lying mineral or minerals, yet such a conveyance, by less all the joint tenants where land is so held, does not effe severance of the mineral interest from the surface, but m the grantee, if he be a stranger, a tenant in common with joint tenant, who did not unite in the conveyance.
2. JOINT TENANTS—*Deeds—Severance of Title.*—While a joint te has capacity to transfer his undivided share in the land has no right to convey by metes and bounds any part of land, or to convey the mineral and reserve the surface to prejudice of his co-owners. A conveyance from one joint te of land owned in fee to a stranger cannot effect a sever of his interest in the land from that of the other joint ten but makes the grantee a tenant in common with the other tenants, and *a fortiori*, a like conveyance of his minera terest only cannot operate a severance of his mineral int from the surface.
3. ADVERSE POSSESSION—*Deed by One Tenant in Common—Col Title.*—If a stranger to the title takes a conveyance of the v estate in a tract of land from one who is only a tenan common with others, and enters into the exclusive posse of the land, claiming title to the whole, it is an ouster o other co-tenants, and the grantee so entering and claiming may rely upon his adversary possession, if continued fo statutory period.
4. TENANTS IN COMMON—*Possession by One—Presumption—Ad Possession.*—The entry and possession of one tenant in co is ordinarily deemed the entry and possession of all, and

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presumption will prevail in favor of all until some notorious act of ouster or adversary possession is brought home to the knowledge of the others. Yet a tenant in common may enter adversely and claim in severalty, and, where he does, the statute of limitations will run in his favor and against his tenants in common.

5. ADVERSE POSSESSION—*Land and Minerals—Deed to Fee—Presumption—Ouster of Co-tenant—Case in Judgment.*—When one enters upon land he is presumed to enter under the title which his deed purports on its face to convey, both as to the boundary or extent of the land and the nature of his title. In the case in judgment, the grantee did not enter as a tenant in common, but under a deed conveying the whole land in fee with covenants of a general warranty. There had been no severance of title of the surface and minerals, and his claim of title to the whole land, including the underlying minerals, from the time of entry under his deed, operated as an ouster of the other tenants in common and gave him the right to rely upon his adversary possession, which, if continued for the statutory period, bars the other tenants both as to the land and the underlying minerals.

6. ADVERSE POSSESSION—*Color of Title—Underlying Minerals.*—Where there has been no severance of title to the surface of land and the underlying minerals, a conveyance in fee of the land constitutes color of title to the whole tract, minerals as well as surface, and adverse possession of the surface for the statutory period, claiming title to both surface and the underlying minerals, gives title to both, although the minerals be claimed by another under a prior deed, which was ineffectual to constitute a severance.

Appeal from a decree of the Circuit Court of Wise county. The complainant appeals from a decree which was in part adverse to its claim.

Reversed in Part.

The opinion states the case.

Bullitt & Chalkley, for the appellant.

Vicars & Peery and *Henry & Graham,* for the appellees.

BUCHANAN, J., delivered the opinion of the court.

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This suit was instituted by the appellant, The Virgi Coal and Iron Company, for the purpose of obtaining p tition of the coal and other minerals in and under a 7 acre tract of land lying in Wise county. The appella claimed an undivided four-fifths interest in the mine under a conveyance to J. D. Price and A. J. Steinm from the wife and three of the four children of James Gibson made in the year 1874. The appellant by regul conveyances acquired the title of Price and Steinman the said mineral interests. After the conveyance to Pr and Steinman the children of James M. Gibson, includi Tabitha, who was not a party to that deed, made a pa partition of the 700 acre tract of land. The land w divided into three parcels—the share of Tabitha, the w of George W. Hylton, and the share of C. W. Gibson, h brother (who had sold or contracted to sell his share George W. Hylton), being laid off as one parcel. Aft wards H. F. Gibson and W. B. Gibson exchanged the p cel allotted to each of them. The owners of the mine interests other than Hylton's wife were not parties that partition and so far as the record shows had no not of it.

One of the defenses set up by the present owners of t Hylton parcel of land and the W. B. Gibson parcel, kno in the record as the Van Buren Bolling land, is that th are the owners of the mineral by adversary possessi The appellant insists that the conveyance to Price a Steinman of the minerals embraced in their deed operat as a severance of the mineral interest from the surfa This is denied by the appellees. They claim that in or for a conveyance of the mineral in land to effect a severa of the mineral interest from the surface, the grantor in t deed must be the owner of the legal title, and that as t grantors in the deed to Price and Steinman were not, the appellees claim, the owners of the legal title when th

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nveyed the mineral interest, such conveyance did not ect a severance.

Whether the grantors were or were not the owners of the gal title at that time, or whether or not it be true as ntended by the appellees that a severance of the mineral terest from the surface is not effected by the conveyance the mineral and a reservation of the surface unless the antor in such conveyance be the owner of the legal title, ed not be determined in this case; for if it were held that e grantors in that deed were clothed with the legal title, that the conveyance by the owners of the equitable title uld effect a severance as well as a conveyance by the ner of the legal title, there was no severance in this se.

It is well settled that the general owner or owners of nd may grant all the minerals in the land, or any particu- species of them, as coal, iron or lead, etc., and remain e owner or owners of the surface, etc., or may grant the nd and reserve the minerals or any particular species of em and thus create a separate estate in the minerals, or neral, reserved distinct from the land in which they are nd. *Va. Coal & Iron Co.* v. *Kelly,* 93 Va. 332, 336, 24 E. 1020; *Interstate C. & I. Co.* v. *Clintwood, &c.,* 105 Va. 4, 54 S. E. 593; *Morison* v. *American Association,* 110 . 91, 65 S. E. 469; *Adam* v. *Briggs,* 7 Cush. (Mass.) 361, 6-7; *Caldwell* v. *Copeland,* 37 Penn. St. 427, 78 Am. c. 436; Barringer and Adams on Mining, &c., 35-6. Yet h a conveyance by less than all the joint tenants where nd is so owned, does not effect a severance of the mineral terest from the surface, but makes the grantee, if he be tranger, a tenant in common with the joint tenant who l not unite in the conveyance.

While a joint tenant has capacity to transfer his un- vided share in the land, he has no right to convey by tes and bounds any part of the land, or to convey the

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mineral and reserve the surface to the prejudice of hi co-owners. 1 Minor's Real Prop., sec. 889, and authoritie cited; Freeman on Co-tenancy, secs. 196-198.

The reason for this doctrine is stated by Chief Justic Shaw in *Adam and Others* v. *Briggs Iron Co.*, 7 Cush. 36 368, and by Allen, P., in *Robinett* v. *Preston*, 2 Rob. (4 Va.) 273, 276-8.

In this case if the grantors in the conveyance to Pric and Steinman had conveyed their entire undivided interes in the land, the surface as well as the minerals, it woul not, no matter how that interest was described, have e fected a severance of their interest in the land from tha of their sister, Mrs. Hylton, but would have made the grantees tenants in common with her. *Robinett* v. *Pre ton's Heirs, supra; Cox* v. *McMullen*, 14 Gratt. (55 Va. 422; *Buchanan* v. *King*, 22 Gratt. (63 Va.) 422; *Wood* *Early*, 95 Va. 307, 312-13, 28 S. E. 374; Freeman on C tenancy, secs. 194-6. *A fortiori*, a like conveyance of the undivided mineral interest only could not operate as severance of their mineral interest from the surface.

In some jurisdictions a conveyance by less than all joint tenants of their interest in the land by metes an bounds, or of their mineral interest only, seems to be r garded as void against their co-tenant (*Adam, &c., Briggs, supra;* Freeman on Co-tenancy, 198-203), bu with us while one joint tenant cannot make any conve ance to the prejudice of his co-tenants, yet the deed is n void, but would, especially under our statute, be effectu to pass the interest conveyed, making his grantee a tena in common with his grantor's co-tenants. Code, sec. 241 *Robinett* v. *Preston's Heirs, supra; Cox* v. *McMulle supra; Buchanan* v. *King, supra; Wood* v. *Early, supr* Freeman on Co-tenancy, *supra.*

The next question to be considered is whether or n Hylton or those claiming under him acquired title to th

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eral interests claimed by the appellant in that portion he 700 acre tract allotted in the parol partition as the es of Hylton's wife and her brother, C. W. Gibson, by ersary possession. This partition as before stated was e after the sale and conveyance of the said mineral rest to Price and Steinman by the children of James Gibson, who seem to have considered their mother as ng a mere dower interest in the land. At least they ded the land into four shares, laying off Mrs. Hylton's C. W. Gibson's shares together as one parcel, Hylton e time of the partition having purchased or contracted urchase the interest of C. W. Gibson. So far as the rd shows, neither the wife nor either of her children e ever questioned the validity of said partition, and it s to have been acquiesced in by all of them. In the 1877, after the partition, the wife and children of es M. Gibson, other than Hylton's wife, executed a to Hylton, in consideration (as recited therein) of hundred dollars, by which they conveyed to him "a ain tract or parcel of land," describing it by metes and ds, with covenants of general warranty. The parcel nd, it is conceded, or at least is clearly shown, to be the e parcel allotted as the shares of Hylton's wife and C. Gibson in the parol partition, but no reference is made e deed to the partition. In October, 1880, after James Gibson had obtained a conveyance from the heirs of . Boggs, from whom the appellees claim that James Gibson purchased the 700 acre tract, or at least a part eof (but had not fully paid the purchase price and ined a conveyance), Gibson executed a deed to Hylton onsideration of $600, as recited therein, by which he eyed the same land embraced in the said conveyance 877 (though no reference is made to that deed) with nants of general warranty. Both deeds were duly re- ed. The appellees claim that Hylton took actual pos-

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session of the land under the conveyance of 1877, and ever since in person or by tenants been in possession th of claiming it in fee. The appellant claims that Hyl and his wife went into possession of the surface of the l after that deed was made, and that they and those cla ing under them have continued in the possesion of the face down to the present. But it denies that such session gave Hylton possession of the minerals under facts and circumstances of this case.

It is well settled in this State that where a purcha if he be a stranger to the title, takes a conveyance of whole estate in a tract of land, although his grantor only a tenant in common with others, and in pursua thereof enters into the exclusive possession of the la claiming title to the whole, it is an ouster of the other tenants and the grantee so entering and claiming title rely upon his adversary possession if continued the st tory period. *Johnston* v. *Va. Coal & Iron Co.*, 96 Va. 163, 31 S. E. 85; *Preston, &c.*, v. *Va. Min. Co.*, 107 Va. 248, 57 S. E. 651; Freeman on Co-tenancy, sec. 197.

It is also well settled that as between tenants in com and others claiming in privity, the entry and posses of one are ordinarily deemed the entry and possessio all, and this presumption will prevail in favor of all u some notorious act of ouster or adversary possessio brought home to the knowledge of the others. Until t is notice, actual or constructive, that the possessio hostile, it will be deemed amicable, notwithstanding tenant's possession may have been wholly advers *Stonestreet* v. *Doyle*, 75 Va. 356, 378-9, 40 Am. Rep. and cases cited; *Pillow* v. *Southwest, &c., Co.*, 92 Va. 23 S. E. 32, 53 Am. St. Rep. 804. Yet a tenant in com may enter adversely and claim in severalty, and when does the statute of limitations will run in his favor against his tenants in common. See *King* v. *Carmich*

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Ind. 20, 35 N. E. 509, 43 Am. St. Rep. 303; *Clymer Dawkins,* 3 How. (U. S.) 674, 11 L. Ed. 778; *Bradstreet Huntington,* 5 Pet. 402, 438-440, 8 L. Ed. 170; *Ricard Williams,* 7 Wheat, 591, 5 L. Ed. 398; *Caperton* v. *gory,* 11 Gratt. (55 Va.) 505; Tyler on Ejectment, 882; *ce* v. *Dyer,* 189 Mass. 64, 75 N. E. 81, 109 Am. St. Rep. ; *Greenhill* v. *Biggs,* 85 Ky. 155, 2 S. W. 774, 7 Am. St. . 579; *Johnson* v. *Toulmin,* 18 Ala. 50, 52 Am. Dec. 212; *wford* v. *Meis,* 123 Iowa 610, 99 N. W. 186, 66 L. R. A. , 101 Am. St. Rep. 337.

n considering the question whether or not Hylton's ry and possession was adversary and hostile, the fa- iar principle must be borne in mind that when one ers upon land he is presumed to enter under the title ich his deed purports upon its face to convey, both as he boundary or extent of the land and the nature of his e. The deed to Hylton from his wife and children of nes M. Gibson in the year 1877 purported to convey the in the whole. It is not controverted that he entered l took possession of the land under that deed, and in absence of anything to the contrary he is presumed have entered under a claim of title to the whole in fee. is is not a case where a tenant in common being, or en- ing into, possession as such afterwards attempts to claim t his possession was adverse to his tenants in common. lton did not enter as tenant in common. From the st he is presumed, indeed he is proved, to have claimed der his deed, and there is nothing to show that he or se who claim under him ever acknowledged that the le to the land was anything other than as it appeared on the face of his deed.

If Hylton had been in possesion of the land under the rol partition as the vendee of C. W. Gibson, or perhaps in ht of his wife, a different question would be presented; t taking a conveyance, which was duly recorded, of the

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whole land in fee with covenants of general warranty, a under such deed entering into the actual possession the of claiming title to the whole, must, we think, be regard as an ouster of the other tenants in common and give H ton the right to rely upon his adversary possession, whi if continued the statutory period would bar the oth tenants.

The evidence clearly shows that Hylton was in the clusive possession of the land from the year 1877, when entered under the conveyance of that date, claiming ti to the whole tract in fee, until the institution of this su a period of thirty years or more. He paid taxes on throughout these years as the fee simple owner; resid upon it the greater portion of the time; conducted m cantile operations upon it; built upon it, cleared portio of it, and mined coal for his domestic purposes and sm quantities for sale. Whether his coal operations duri that period would have been sufficient to have given h title to the coal if the mineral interest had been sever from the surface need not be considered, since as we ha seen there was no such severance; but unquestionably h acts of adversary possession were sufficient to create in h a complete title to the land in fee, mineral as well as su face, for his deed covered both.

It follows from what has been said that there was error in the circuit court's action in reference to the Hylt portion of the 700 acre tract.

The action of the circuit court in holding that the a pellant was the owner of a four-fifths mineral interest the Van Buren Bolling parcel of the 700 acre tract of lan and decreeing a partition of the mineral interest therei is assigned as cross error.

When W. B. Gibson conveyed his undivided mineral i terest in the 700 acre tract of land to Price and Steinma he was only about nineteen years of age. After his m

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rity he sold, as he claims, the surface in the share of the 00 acre tract (which he acquired under the parol partiion and by exchange with his brother, H. F. Gibson) to Villiam Merricks and directed his father, James M. Gibn, whom he seems to have thought was the holder of the gal title, to convey the same to Merricks. His father 1880 executed a conveyance to Merricks, by which he nveyed or undertook to convey the said parcel in fee, ith covenants of general warranty. This conveyance it claimed was a disaffirmance of the conveyance made by . B. Gibson to Price and Steinman, since it made no servation of the mineral interest theretofore sold them. ibson testified that Merricks knew that he had sold the ineral interest and that he was only selling and intendg to sell him the surface. This is denied by Merricks, ho testified that he purchased the land in fee in accordce with the terms of the conveyance made to him by J. . Gibson. Whether or not the deed made by the father the parol direction of the son, under the facts disclosed the record, would make out a case of disaffirmance of e conveyance of the mineral made by W. B. Gibson to rice and Steinman, in the view we take of the case need ot be considered, for if it did not Merricks and those who aim under him have acquired complete title to the land nder color of title by adversary possession. Merricks ent into possession of the land under his purchase from . B. Gibson. He conveyed the same in fee simple with venants of general warranty in the year 1884 to Ephraim rock. Brock conveyed it with like covenants to J. H. tallard in the year 1886, and in 1887 Stallard conveyed with like covenants to Van Buren Bolling. It is not ntroverted, as we understand the record, that Merricks nd those who claim under him have since the year 1880 een in the actual and uninterrupted possession of the surce of the land, claiming it as their own.

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The contention of the appellant is that neither Merri
nor any of those who claim under him ever entered u
the coal or other minerals on or under the land. Ther
no evidence that they ever mined or used the coal or ot
minerals in any way, and if there had been a severa
of the mineral interest from the surface no case of t
to the minerals by adversary possession would be prov
but as there was no severance of the minerals and the
veyance to Merricks was in fee without any reservatio
the minerals, the conveyance to him and the conveya
to those who claim under him was color of title to
whole tract, mineral as well as surface. Merricks
those claiming under him having been in the advers
possession of the land, claiming title to the whole fee
more than the statutory period, the claim of the appell
to the mineral interest therein was barred, and the cir
court erred in not so holding.

The court is of opinion that in so far as the decre
the circuit court holds that the appellant has any inte
in the mineral on the Van Buren Bolling land and dir
partition thereof with costs, it is erroreous and must
reversed, and in other respects affirmed.

Reversed in Par

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Syllabus.

Staunton

THE VIRGINIAN RAILWAY COMPANY v. BELL.

September 11, 1913.

Absent, Keith, P.

1. NEGLIGENCE—*Contributory Negligence—Instructions.*—Where there is evidence in a case tending to show such contributory negligence on the part of the plaintiff as would bar his recovery, the defendant is entitled to have the question of the contributory negligence of the plaintiff clearly and fully submitted to the jury, and not by mere implication, nor by an instruction on the burden of proof, which refers only in the most general way to the care required on the part of the plaintiff.
2. INSTRUCTIONS—*Error—When Court to Correct—Negligence—Contributory Negligence.*—Where the evidence tends to show negligence on the part of the defendant and also contributory negligence on the part of the plaintiff, and the jury have been fully instructed as to the former, it is error to leave the jury uninstructed on the latter where the court has been requested to instruct on that subject, but the proffered instruction contains an erroneous statement of the law. The court ought to have corrected the proffered instruction or given one in lieu of it which as fully and distinctly submitted to the jury the theory of the defendant as to the contributory negligence of the plaintiff as the instructions given for the plaintiff submitted his theory of the negligence of the defendant.
3. NEGLIGENCE—*Question for Jury.*—The absence of a hook with which to fasten back a car door being the ground of the negligence charged against a defendant, the question of whether or not the plaintiff, in the circumstances surrounding him, would have made use of the hook, if one had been provided, should be left to the jury, for the absence of the hook could not have been the proximate cause of the plaintiff's injury if he would not have used it had it been in place.
4. INSTRUCTIONS—*Evidence to Support.*—It is not error to refuse an instruction when there is no sufficient evidence on which to base it.

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5. CARRIERS—*Passengers—Mail Clerk—Assumption of Risk—Contr tory Negligence.*—A mail clerk on a railway train occupies position of a passenger. He does not assume the risk of defective car in which he works, but, knowing of the def he is bound to use ordinary care for his own protection; if in consequence of his failure to do so he is injured, h guilty of contributory negligence, which will bar his recov

Error to a judgment of the Circuit Court of Montgom county in an action of trespass on the case. Judgment the plaintiff. Defendant assigns error.

Reversed

The opinion states the case.

Hall & Woods, Hunter J. Phlegar and *G. A. Wingfie* for the plaintiff in error.

A. B. Hunt and *Abram P. Staples, Jr.,* for the defend in error.

BUCHANAN, J., delivered the opinion of the court.

This action was brought by the defendant in error, O. Bell, to recover damages for personal injuries caused, alleged, by the negligence of the plaintiff in error, Virginian Railway Company. Upon the trial of the ca there was a verdict and judgment against the railw company, and to that judgment this writ of error w awarded.

The first error assigned is to the action of the court giving the following instructions asked for by the plaint

"I. The court instructs the jury that if they believe fr the evidence that the plaintiff on October 26, 1911, w United States railway mail clerk and in the discharge of duties as railway mail clerk on combination mail and b gage car No. 23 of train No. 14 of the defendant railw

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ompany, was injured by being struck on the neck by the iding door of said car, and that his said injury was caused y the absence of a fastener or hook on the sliding door of aid car; that a reasonably safe hook or other fastener ould have been provided for and attached to said door by ne exercise of the utmost care on the part of the defendant ompany, and that the exercise of the utmost care for the rotection of the said plaintiff on the part of the defendant ompany required that said company should provide a easonably safe hook or other fastener for said door; and at the said plaintiff's injuries resulted solely and proxnately from such negligence of said defendant in not exrcising the utmost care to provide said hook, then the ry shall find for the plaintiff and assess his damages at ch sum as they may believe he has sustained, not exeeding the amount alleged in the declaration."

"II. The court instructs the jury that if they believe om the evidence that the plaintiff on October 26, 1911, as a United States railway mail clerk in the discharge of s duties as railway mail clerk on combination mail and ggage car No. 23 of train No. 14 of the defendant railway ompany, was injured by being struck on the neck by the iding door of said car, and that his injury was caused the fact that said combination mail and baggage car No. was being run with the mail end of said car to the rear stead of with the mail end of said car forward; and that id car could have been run with its mail end forward by e said defendant company by the exercise of the utmost re on its part, and the exercise of the utmost care on e part of the defendant for the protection of the said aintiff required that said defendant should run the id combination car with its mail end forward, and that id plaintiff's injuries resulted solely and proximately om said defendant's negligence in not exercising the utost care to run said car with its mail end forward, then

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the jury shall find for the plaintiff and assess his dama at such sum as they may believe he has sustained, not ceeding the amount alleged in the declaration, to-wit, sum of $15,000.

"III. The court instructs the jury that if they beli from the evidence that the plaintiff on October 26, 19 was a United States railway mail clerk and while in the charge of his duties as railway mail clerk on combinat mail and baggage car No. 23 of train No. 14 of the defe ant railway company, was injured by being struck on neck by the sliding door of said car; that said train No. on which plaintiff was being carried was being negligen run at an excessive rate of speed, and was suddenly a negligently checked, and that as a result of said excess rate of speed and said sudden checking, that said slid door of said car struck the said plaintiff on his neck and jured him; and that said excessive speed and sudden che ing of said car could have been avoided by the exercise the utmost care on the part of the defendant railway c pany; and that said plaintiff's injuries resulted solely a proximately from the negligence of said defendant in f ing to use the utmost care to avoid running its train an excessive rate of speed and to avoid a sudden check of the speed of said train, then they shall find for plaintiff and assess his damages at such sum as they m believe he has sustained, not exceeding the sum of $15,0 the amount sued for.

"IV. The court instructs the jury that if they beli from the evidence that the plaintiff on October 26, 19 was a United States railway mail clerk and in the discha of his duties as railway mail clerk on combination mail a baggage car No. 23 of train No. 14 of the defendant railw company, was injured by being struck on the neck by sliding door of said car, and that his said injury was cau by the fact that said car was being run with mail end

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e rear, and by the fact that said car was equipped with a
ding door instead of a hinge door, and further by the
t that there was no hook or other reasonably safe fast-
er provided for said sliding door, and further by the fact
at said train No. 14 was being negligently run at an ex-
ssive rate of speed, and that the speed of said train was
ddenly and negligently checked, and that said defendant
mpany, by the exercise of the utmost care could have
n said car with mail end forward, and could have pro-
ded a hinge door in lieu of a sliding door, for said car;
d further could have provided a reasonably safe hook or
ier fastener for said sliding door; and that the exercise
the utmost care for the protection of the said plaintiff,
the part of said defendant company, required that said
mpany should run said car with the mail end forward,
d should provide said car with a hinge door instead of a
ling door, and should provide a reasonably safe hook or
er fastener for said sliding door, and that such utmost
e on the part of the defendant for the protection of the
intiff required that it, the defendant, avoid such run-
g at such excessive speed and sudden stopping, and that
d plaintiff's injuries resulted solely and proximately
m any one of the above mentioned acts of negligence of
d defendant, or from the concurrence of two or more
said acts of negligence, then the jury shall find for the
intiff and assess his damages at such sum as they may
ieve he has sustained, not exceeding the sum of
,000.00."

Each of these instructions is objected to upon the ground
t they leave out of view the defendant company's theory
the case—that the plaintiff was guilty of contributory
ligence. This objection may be considered in connec-
n with the refusal of the court to give the defendant's
truction No. 6, which is also assigned as error.

There was evidence tending to show that the plaintiff
w of the alleged defective condition of the car; that it

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was not being run with its mail end next to the engine, he claims it should have been; that the door of the c would shut upon the sudden application of the brak when the train was running rapidly; that such appli tion of the brakes might occur at any time; and that could have taken but did not take any precautions for l protection at the time he was injured. The defendant w therefore entitled to have the questions of contributory ne ligence clearly and fully submitted to the jury. The pla tiff's instructions 1, 2, 3 and 4 distinctly and fully subm ted the plaintiff's theory of the case to the jury. While each of those instructions the jury are told that if tney l lieve the facts hypothetically stated in them they must fi for the plaintiff, yet in neither of them is there the usu qualification (where there is evidence tending to show th the plaintiff was not in the exercise of due care), "unle they believe that he was guilty of contributory negligence See *A. C. L. Ry. Co.* v. *Caples,* 110 Va. 514, 519, S. E. 855.

The plaintiff insists that the qualification as to contrib tory negligence is contained in the requirement in his i structions 1, 2, 3 and 4, that the jury should believe th the alleged acts of negligence on the part of the defenda were the sole and proximate cause of the accident, befo they could find for him, and in his seventh instruction.

That instruction is as follows: "The court instructs t jury that if the defendant company relies upon contrib tory negligence of the plaintiff, as a defense to this actio then unless the same appears from the testimony intr duced by the plaintiff the burden of proving such co tributory negligence on the part of the plaintiff is upon t defendant, and it must appear by a preponderance of t evidence that said plaintiff failed to exercise, for his ow safety, that degree of care, under all the circumstanc of this case, which a reasonably prudent person, usin ordinary care, would have exercised."

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The plaintiff's instructions Nos. 1, 2, 3 and 4 only submit question of contributory negligence to the jury by im-cation, and his instruction No. 7 is directed chiefly to ing the jury upon whom was the burden of proof on that ue, and only in the most general way refers to what uld constitute due care on the part of the plaintiff. ese instructions not only did not submit fully and clearly question of contributory negligence to the jury, but the rt refused to give the defendant's instruction No. 6, ich was in these words:

"The court instructs the jury that although they may ieve from the evidence that at the time the plaintiff ims he was injured the defendant was negligent in using ail car with a sliding door and without a hook to hold door open, or in so placing the mail car in the train t the door would slide shut in the direction the train s moving, or in running the train at an excessive rate of ed and stopping it suddenly, yet if they further believe m the evidence that the plaintiff knew of the condition said door and the position the mail car was placed in train, that the train was running at a rapid rate of ed and might possibly be suddenly stopped at any time, with knowledge of these facts the plaintiff thrust his d out of the door without using the means or precau-s which he could have used to properly hold the door n, then the plaintiff was guilty of contributory negli-ce, and they must find for the defendant."

That instruction sets out the facts relied upon by the endant to show that want of due care on the part of the ntiff at the time of the accident, and while it declares these facts as a matter of law would make out a case ontributory negligence, instead of leaving that question he jury, still as the instructions given for the plaintiff not distinctly and fully submit that question to the , the court under the circumstances ought to have cor-

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rected instruction No. 6 or given an instruction in lieu it which as fully and as distinctly submitted to the jury t theory of the defendant as to contributory negligence the part of the plaintiff, as the instructions given submitt the theory of the plaintiff as to the negligence of the fendant.

Instructions Nos. 1 and 2 are also objected to upon t ground that they are in conflict with the defendant's i struction No. 8. That instruction told the jury that the could be no recovery under either count in the declaratio "unless the train approached the station at Ironto at rapid rate of speed and that the speed of said train was suddenly checked as to cause the mail car to lurch forwa with greater violence than ordinarily attends the stoppi of trains, and that as a result thereof the door of the m car slid shut with such force" that it caused the inju complained of.

The evidence tended to show that the use of the mail c with a hanging door without hooks, or the running of t car with the wrong end foremost, could not have caus the sliding door to shut suddenly and violently unless t train was running rapidly and was suddenly checked. Th this was the case was recognized by the pleader in frami his declaration, for in the first and fourth counts t rapid running and sudden checking of the train are charg to have been negligent, and in the second and third coun while these acts are not alleged to have been done neg gently, yet the allegations show that the accident cou not have happened but for such rapid running and sudd checking.

But it is insisted by the plaintiff that his instructio (Nos. 1 and 2) require the jury to so believe before th could find for him, since his right to recover under either said instructions is made to depend upon the fact that t sole and proximate cause of his injuries was the act or a of negligence hypothetically stated in each.

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While instructions Nos. 1 and 2 are not as clear upon
at point as they might be, yet when read in connection
th instruction No. 8 we do not think that the jury could
ve believed that the plaintiff was entitled to recover un-
s they had further believed that the train was running
pidly and was stopped suddenly when he was injured.
t as the judgment will have to be reversed upon other
unds, it would be better to make the instructions given
on the next trial clear upon this question.

Another objection made to instruction No. 1 is that there
s evidence tending to show that, under the circumstances
closed by the plaintiff's own evidence, he would not have
d the hook if it had been in place. He stated that when
e engineer blew the signal for the station, "I was chang-
my clothes; I pulled on my breeches. I didn't have no
lershirt on, and when I ran to the door and looked out
see where I was, and just as I looked out he put his air
" One of the plaintiff's witnesses, also a mail clerk,
tified that a mail clerk who was only looking out to see
he mail was up would not think of the hook, but would
d the door open with his hand. It is true that the plain-
himself testified that he had no way of holding the door
n while he was preparing to catch the mail, but he does
deny that in looking out to see where he was or whether
not the mail was up he could have held the door open
h his hand. Opening the door to see where the train
s or whether or not the mail was up required but a
ment of time, and it is highly probable that under the
umstances disclosed by his own evidence the plaintiff
uld not have used or thought of the hook, as his own
ness testified.

There being evidence tending to show that if the hook
been in place a mail clerk under like circumstances
uld not have used it, the question of whether or not the
intiff would have used it to fasten the door before look-

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ing out ought to have been left to the jury, for the absen of the hook could not have been the proximate cause the plaintiff's injury if he would not have used it if place.

The next assignment of error is to the action of the cou in refusing to give instructions numbered 4, 5, 6, 10 and offered by the defendant.

Instruction No. 4 was properly rejected. While there evidence tending to show that a mail clerk in looking o of the door to see where his train was, or whether the m was up would not have used the hook if it had been in pla under the circumstances testified to by the plaintiff (a hereinbefore discussed in considering the last objection the plaintiff's instruction No. 1), there is no sufficient e dence to show that in handling the mails at the stations would not have used the hook, or that it was not commo used while actually handling the mail at stations, to just the giving of the instruction as offered.

Instructions Nos. 5 and 10 were also properly refus Each of these instructions made the plaintiff's right to cover depend upon the fact that the defendant was gui of negligence in the running of its train. Under the seco and third counts in the declaration the right of the pla tiff to recover does not depend upon the negligent runni of the train, but upon the character and condition of mail car and the manner in which it was placed in the tra While under the allegations of these counts the accid would not have resulted but for the rapid running a sudden stopping of the train, there is no allegation t the defendant by such rapid running and sudden stoppi was guilty of negligence.

The objection to instruction No. 6 was discussed in c sidering the assignment of error as to the giving of plaintiff's instructions, and need not be referred to furth

Neither did the court err in rejecting the defendar instructions Nos. 11 and 12. By instruction No. 11

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ırt was asked to tell the jury that if the plaintiff knew several months before the accident that there was no ok to hold the mail car door open, and that it was dan- ous to operate it without a hook, and the plaintiff con- ued to perform his duties as mail clerk without report- g the absence of a hook and without a promise from the fendant to replace it, the plaintiff assumed the risk and ıld not recover. By instruction 12 the jury were to be d that if the plaintiff knew of the absence of the hook d that it was dangerous to operate the car without it d continued to perform his duties as mail clerk without orting the absence of the hook to the chief clerk of the lway mail service, or to the defendant, then he was ilty of contributory negligence and they must find for e defendant. The effect of both of these instructions s to hold that the plaintiff had assumed the risk result- g from the absence of hooks on the car door. If the fail- e to place and keep hooks on the car door was negligence the part of the defendant and the plaintiff knew of their sence, it was his duty to exercise reasonable or ordinary re in using the door in his work, and if he failed to do so was guilty of contributory negligence and could not re- ver. But in discharging his duties as mail clerk in the r in its alleged defective condition without informing e railway mail service or the defendant of the defective ndition of the car, he did not assume the risk of damage sulting from the absence of hooks, nor did his failure to notify either deprive him of the right of recovery. The lation which the plaintiff bore to the defendant as a com- on carrier imposed upon it the same degree of care for n that it was bound to exercise toward its other passen- rs. *N. & W. Ry. Co.* v. *Shott,* 92 Va. 34, 44, 22 S. E. 811. e *Lindsay* v. *Pa. R. Co.,* 26 App. Cas. (D. C.) 503, 6 Ann. ses, 862, and note 863--865 and authorities cited. It was cumbent, therefore, upon the defendant to see that its

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mail car was such as it was its duty to furnish and m
tain, and if it failed to do so the plaintiff was entitle
recover, unless he was guilty of contributory negligе
It would scarcely be contended that if an ordinary pes
ger on a passenger train had known for weeks or mo
that the car upon which he was accustomed to travel
in a defective condition, by reason of which defect he
injured while in the exercise of reasonable care on
part that he could not recover because he had faile
inform the carrier of such defect, a defect which under
high degree of care imposed upon it, it was bound to
knowledge of and remedy.

Another error assigned is to the refusal of the cou
permit a map or drawing which purported to be a stand
plan of the United States railway postal compartment c
The objection made to the paper offered was that it
offered as a copy and that it was not authenticated as
vided by section 3343 of the Code, nor was there evid
that it had been compared with the original and foun
be a correct copy.

The ruling of the court seems to have been proper f
what appears in the record, but as the objection mad
the paper can be cured before or at the next trial it
be unnecessary to pass upon the question.

The remaining assignment of error is to the refusa
the court to set aside the verdict. As the judgment c
plained of must be reversed, this assignment of error
not be considered, as the evidence may and the instruct
will be different on the next trial.

The judgment will be reversed, the verdict set a
and a new trial awarded to be had not in conflict with
views expressed in this opinion.

Reverse

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Richmond

ALPHIN v. LOWMAN.

November 20, 1913.

CONTRACTS—*Promise to Become Surety—Indemnity—Statute of Frauds—Case at Bar.*—A promise by a surety that he will indemnify another if he will become co-surety with him on the debt of a third person is an original undertaking and not within the statute of frauds. In the case at bar, the promise, which was held to be an original undertaking, was in the following words: "Go ahead and endorse it; you need not be uneasy; Gillespie" (the principal) "is all right. If he did not have a thing, you will never have a dollar to pay as long as I have got a dollar's worth of property." *Wolverton* v. *Davis*, 85 Va. 64, *disapproved.*

CONTRACTS—*Promise to Answer for Debt of Another—Statute of Frauds—Negotiable Instruments Law.*—The principle announced above is not affected by section 68 of the negotiable instruments law with reference to the liability of joint payees or endorsees who endorse negotiable paper. The object and purpose of that section is only to give statutory force to a principle already established. That section establishes the *prima facie* order in which endorsers are to be held liable, but among themselves they are permitted to show that they have agreed otherwise. The clause with respect to joint payees or endorsees was added, not to deprive them of the right to prove by evidence *aliunde* that they have made an agreement among themselves which varied the liability imposed by law, but out of abundant caution to negative the conclusion that they were to be liable in the order in which they became endorsers, for when there are two or more joint endorsers, it is apparent that the mere affixing of their signatures must have been successive one after the other.

Error to a judgment of the Circuit Court of Bath county in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

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The opinion states the case.

George A. Revercomb and *John W. Stephenson & S* for the plaintiff in error.

John T. Delaney and *H. H. Byrd,* for the defendant error.

KEITH, P., delivered the opinion of the court.

The Citizens National Bank of Covington, Va., held notes, one for $3,000 and one for $5,000, drawn by Gillespie and made payable to Alphin, Blakey and Lown as joint payees. These notes were renewed from time time, but ultimately went to protest. Suit was brou upon them and judgment recovered, upon which executi were issued and placed in the hands of the sheriff, levied upon the property of Alphin, Blakey and Lown The property of Lowman which was levied upon was s and brought $988.90; that of Blakey brought $216, and balance of the judgment was paid by L. C. Alphin; Gil pie, the principal having in the meantime become a ba rupt. Lowman then instituted an action of assum against Alphin to recover the amount which he had p and a like suit was instituted by Blakey.

To these suits Alphin pleaded non-assumpsit, an special plea, in which he claimed that Lowman, Blakey he were joint endorsers on the notes, and as between th selves were each liable for one-third of the judgments executions, and in this special plea Alphin set up amount due him and asked that judgment be given agai Lowman for the sum of $1,904.53 2-3, which he claimed had paid for Lowman, the plaintiff, on said executions.

At the trial Lowman proved that there was a ver agreement between himself and Blakey, on the one ha

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d L. C. Alphin, on the other, whereby Alphin was to be ponsible as between the endorsers for the whole of said tes, and was to stand liable for any amount that might asserted against the plaintiff by reason of his becoming endorser upon said notes. The specific promise was out in this form: That when Alphin approached Blakey l Lowman and requested them to become joint payees endorsers with him upon the note, he said to them: "Go ead and endorse it; you need not be uneasy, Gillespie ll right. If he did not have a thing, you will never have dollar to pay as long as I have got a dollar's worth of perty."

The plaintiff in error objected to the admission of evi- nce tending to prove the verbal promise, and after the dence was concluded the court at the instance of the intiff gave the following instruction:

"The court instructs the jury that they shall find for plaintiff if it has been proven by a preponderance of evidence that on or about April 26, 1906, the plaintiff the request of the defendant endorsed the notes of C. D. lespie for $5,000.00 and $3,000.00 in order to help the endant to get the Citizens National Bank of Covington, rginia, to loan said Gillespie the sum of $8,000.00; and t at the time the plaintiff endorsed the said notes, the endant represented unto him and assured him that if would endorse said notes he would never have to pay a t on them as long as he—the defendant—owned a dol- 's worth of property."

The plaintiff in error objected to the giving of this in- uction; and, the jury having rendered a verdict on be- f of the plaintiff, plaintiff in error moved to set it aside, ich the court refused to do and entered the judgment ich is now before us.

The entire defense of plaintiff in error turned upon the estion, whether or not the promise which the evidence

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shows that he made to Blakey and Lowman, and which duced them to become payees and endorsers of the no is within the statute of parol agreements, commonly kn as the statute of frauds.

It may be well to state before going further that w both of these notes were originally given to the Citiz National Bank of Covington, Va., one of them—the $5, note—was finally transferred to the Bath County Natio Bank; but this circumstance we regard as immaterial, the same rights and duties remain in the parties to transaction when the note is in the hands of the B County National Bank as attached to it when in the ha of the first holder.

The question for decision is whether the promise mad Alphin, that he would save Lowman harmless if he wo join him as endorser upon the note drawn by Gilles is within the statute of parol agreements, as being an dertaking to answer for the debt or default of another whether it is an original undertaking or promise upon part of Alphin to answer for his own debt?

The statute reads as follows: "No action shall be brou in any of the following cases: . . . Fourth, To cha any person upon a promise to answer for the debt, defa or misdoings of another; . . . Unless the prom contract, agreement, representation, assurance, or ratif tion, or some memorandum or note thereof, be in writ and signed by the party to be charged thereby, or his age but the consideration need not be set forth or expressed the writing, and it may be proved (where a considerat is necessary) by other evidence." Code, sec. 2840.

It is earnestly contended by the plaintiff in error t the decision of this question is controlled by section 6 the Negotiable Instruments Law, which reads as follo "As respects one another, indorsers are liable *prima fa* in the order in which they indorse; but evidence is adm

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e to show that as between or among themselves they e agreed otherwise. Joint payees or joint indorsers indorse are deemed to indorse jointly and severally;" contention being that the statute having declared that t payees or joint indorsers who indorse are to be deemed having indorsed jointly or severally, no evidence is issible to show a different order or extent of liability; to this argument we cannot accede.

he object and effect of that section is but to give statu- force to a principle already established.

Bank of United States v. *Bierne,* 1 Gratt. (42 Va.), 271, 42 Am. Dec. 551, the law upon this point is thus ed: "The legal effect of several successive endorsements at each endorser has a right to look for indemnity to he endorsers who precede him, whether they endorse for mmodation of the drawer or for value received; unless e be an agreement *aliunde,* different from that evi- ed by the endorsements." Citing *Chalmers* v. *Mc- do,* 5 Munf. (19 Va.) 252, 7 Am. Dec. 684, and *Bank anmeter,* 4 Rand. (25 Va.) 553. "By a joint endorse- t," says the same case, "for accommodation of the ver, all the endorsers are co-sureties, bound to con- ution; and if such an endorsement had been made in case, Beirne would have a right, by virtue thereof, to on the others to share the burden; unless there was an ement, proved by evidence *aliunde,* that he should bear whole, or more than an aliquot part."

he first clause of the section under consideration es- ishes the *prima facie* order in which endorsers are to eld liable, but among themselves they are permitted to that they have agreed otherwise. The clause with re- t to joint payees or joint endorsees was added, not to ive them of the right to prove by evidence *aliunde* that have made an agreement among themselves which ed the liability imposed by law, but we think out of

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abundant caution to negative the conclusion that they w
to be liable in the order in which they became endors
for when there are two or more joint endorsers, it is
course, apparent that the mere affixing of their signatu
must have been successive one after the other.

The principal defense, however, is that the promise re
upon is within the statute above quoted, and can only
maintained when evidenced by a written momorandu

It is amazing how language, apparently so plain, sho
have been the cause of such interminable controversy
contrariety of opinion. Among the earliest cases deal
with the subject is that of *Thomas* v. *Cook,* 8 Barn. &
728, in which it was held that such a promise was
within the statute and could be proved by oral evide
Shortly thereafter, in the case of *Green* v. *Cresswell,*
Adol. & E. 453, a contrary conclusion was reached,
Thomas v. *Cook* was overruled. The conflict between th
two cases has led to the diversity of opinion which ex
among the States of the Union; and, without a particu
discussion of the English cases which have followed th
cited, it may be conceded that subsequent English d
sions have settled the law within their jurisdiction in
cordance with *Thomas* v. *Cook.* It may be further
ceded that the American cases, in number at least,
ponderate upon the same side of the controversy;
among the cases which maintain that such promises
indemnity are not within the statute of frauds the n
discordant reasons are given—reasons as irreconcila
among themselves as they are to those given in cases wh
adopt the opposite conclusion. The principal controve
seems to be waged around the proposition, whether
promise of indemnity is an original or a collateral prom
—whether or not, in the case before us, the promise of
phin was to answer for his own debt, default or mis
riage, or was collateral to the promise of Gillespie to

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debt which he owed to the bank. Without doubt the mary obligation to pay the debt rested upon Gillespie. he discharged that obligation, the debt was satisfied and burden was imposed upon the sureties or endorsers. If lespie failed to pay the debt, then the obligation arose l the duty devolved upon the sureties.

n *Wolverton* v. *Davis,* 85 Va. 64, 6 S. E. 619, 17 Am. St. p. 56; the question was before this court, only three ges being present. In that case Thomas K. Davis was ted sheriff of his county and executed an official bond h W. W. Davis and Samuel Wolverton and others as sureties. W. W. Davis had requested Wolverton to cute the bond as a surety, and promised orally to in- nify him against any loss arising from the suretyship. reason of the default of the sheriff, Wolverton had to a sum of money as such surety. He sued W. W. Davis the parol promise of indemnity to recover that sum. the trial he offered evidence of the parol promise, which court excluded. There was a judgment for the de- dant and Wolverton appealed. The judgment was af- ned, the court resting its opinion chiefly upon *Green* v. *sswell,* 10 Adol. & E., *supra.*

t appears, therefore, that that case is in principle identi- with the one before us. It is true that *Wolverton* v. *vis* was with respect to the liability of sureties upon a nd, while in the case before us it is as to the liability *er sese* of endorsers; but the same principles are be- ved to apply to both cases.

n Smith's Leading Cases (8th Am. Ed.), p. 538, after cussing a number of cases bearing upon the subject, it said: "Amidst the diversity of decision, it may be diffi- t to discover the true principle, but the result of the horities, as a whole, seems to be as follows: A promise a stranger to the debt, to indemnify a surety, is *prima ie* within the statute, because the principal is bound by

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an implied obligation to do that which the promisor agr
to do expressly, and the promise is, therefore, really
answer for the default of the principal. When, howev
the promisor is directly or indirectly answerable for
debt independently of the promise, any engagement whi
he may make, that it shall be paid, or that the surety sh
not be compelled to pay it, will be regarded as contract
on his own behalf, and not for the debt or default of anot
in the sense in which the term is used in the statute."

Now in the case before us the promisor, Alphin, is
a stranger to the debt, but is answerable for the debt,
dependently of the promise to Lowman, and, therefo
when he undertook that Lowman should not be compel
to pay it, he is to be regarded as contracting in his o
behalf, and not for the debt or default of another.

In *Barry* v. *Ransom*, 12 N. Y. 462, Judge Denio, del
ing the opinion of the court, held, after citing different
judications upon the point, that those where the promis
was himself bound for the third person's default are u
form in holding that the contract is not affected by
statute.

In Throop on the Validity of Verbal Agreements, secti
474, after an exhaustive consideration of the cases beari
upon the question, it is stated: "As the result of the c
flict of authority upon this question, nothing can be
garded as definitely settled; except, perhaps, that whe
the promisor and the promisee are about to unite in an
strument as sureties for the third person, the promise
indemnify is not within the statute. With respect to t
weight of argument, the side to which the balance prepo
derates is even more difficult to discover. If the questi
was merely whether the general policy of the statute e
braces such cases, probably few lawyers would hesitate
answer it in the affirmative."

Treating on this subject, at section 162, Browne on t
Statute of Frauds (5th Ed.), uses the following languag

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would be unprofitable to trace the course of the Ameri- decisions here cited. It has manifestly resulted in the ection, by the great preponderance of authority, of the trine of *Green* v. *Cresswell,* and the acceptance of the trine of *Thomas* v. *Cook,* a result reached after much illation on the part of the courts of the same State, and , it must be confessed, by reference to any clear and isfactory ground of principle. Indeed, most of the de- ions which reject the doctrine of *Green* v. *Cresswell* ive altogether the question of principle, and put it as natter setttled by authority that the 'promise to in- nnify' is not within the statute. In other cases it is upon the ground that the plaintiff makes his engage- nt, relying upon the defendant's special promise, and not on the third party's implied liability; that the former l not the latter is the foundation of the special contract; l that the decisive question is to whom credit was given the plaintiff. But as we shall have occasion to see here- er, the application of the statute cannot safely be de- mined by the consideration that the plaintiff relied upon obligation to himself rather than upon another; or n that he relied wholly upon the obligation of the de- dant's special promise, giving 'credit' solely to him, till a third party was really liable to the plaintiff to the ne extent."

n 20 Cyc. pp. 178-9, it is said: "In England it is practi- ly settled that if one person, at the request of another l on his oral warranty of indemnity against loss, as- nes a responsibility for the discharge of a third person's igation to a fourth, he may recover against the guaran- , although there is on the part of the third person a co- stent implied obligation to indemnify the promisee; and weight of authority in this country is in accordance th the English view. In many States, however, a con- ry view has been adopted, and a promise of indemnity

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given under such circumstances is held to be within
statute."

One of the most recent cases we have seen is that
Rose v. *Wollenberg,* 31 Oregon, 1269, 44 Pac. 382, 39
R. A. 378, 65 Am. St. Rep. 826, in which it is held tha
contract between co-sureties fixing the proportion and
tent of their several or correlative liability as betw
themselves is not within the statute of frauds. The co
in its opinion said: "Seek where you will for a plausi
footing upon which to found the obligation so as not
come within the purview of the statute of frauds, the
tinction taken in *Green* v. *Cresswell,* of *Thomas* v. *Co*
that the promisee became likewise bound upon the o
gation with the promisor, as co-sureties, and for this reas
if not also for the reason upon which the second class
supported—that it is not an undertaking with the credi
—the indemnity is not within the statute, whether adequ
or not, has taken deep hold in the judicial mind, and the
doubted weight of authority in this country is groun
upon it. Indeed, the doctrine is even regarded as sett
Mr. Throop, in his treatise on the Validity of Verbal Ag
ments (section 474), says: 'As the result of the conf
of authority upon this question (speaking generally of c
tracts of indemnity against a surety's liability), noth
can be regarded as definitely settled, except, perhaps, th
where the promisor and promisee are about to unite in
instrument as sureties for the third person, the promise
indemnify is not within the statute.' If one co-surety c
by a verbal undertaking, indemnify another in wh
against the obligation of the latter, without suffering
interdiction of the statute, he may also in part, as
greater includes the less; and thus it is that co-surety
may, by contract, agreement, or understanding betw
themselves, limit and fix the proportion and extent of th
several or correlative liability, and it is competent to

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lish the agreement by parol. So we conclude that it s competent for the plaintiff and defendant to enter o such a contract or agreement as is set forth in plain-'s complaint and the fact that it is not in writing can- be taken as an objection against its enforcement."

Turning for a moment to section 68 of the Negotiable truments Law, already cited, it is to be observed that right of endorsers to show the order and extent of ir real liability among themselves is recognized by the tute, a right which has been fully established by the isions. See *Bank* v. *Beirne, supra.* And speaking of s principle, at section 475, Throop on Verbal Agree-nts says: "It cannot be restricted within the bounds plied by the rule, that several sureties upon the same trument may regulate by contract their liability to tribution. For if it will suffice to defend an action for tribution, in favor of the verbal promisor against the misee, we fail to see upon what principle it will not sufficie to maintain an action in favor of the promisee inst the promisor to recover the whole amount of dam-s which the plaintiff has sustained through a breach of verbal promise. And no substantial reason is per-ed why the right to maintain such an action should de-d merely on the fact that the plaintiff and the de-lant had united in the execution of the same in-ment."

We have not undertaken to discuss the various authori-but have contented ourselves with stating what seemed e beyond question, that the great weight of authority followed the English decision of *Thomas* v. *Cook,* *ra,* and held that such a promise of indemnity as that which we are dealing is not within the statute of ds.

here are cases of great weight which hold to the con-y. Among the most notable are *May* v. *Williams,* 61

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Miss. 125, 48 Am. Rep. 80; *Macey* v. *Childress,* 2 Tenn. C
438; *Draughan* v. *Bunting,* 31 N. C. 10; *Bissig* v. *Brit*
59 Mo. 204, 21 Am. Rep. 379; *Hartley* v. *Sanford,* 66 N
Law 627, 50 Atl. 454, 55 L. R. A. 206. The argum
pro and con are well balanced, but the authorities, as
have more than once said, strongly preponderate in f
of the validity of such agreements. We have not deem
profitable to cite or comment upon the wilderness of c
touching the subject discussed, but have been conten
ascertain and to state in what direction they preponde
Those who desire to explore the matter still further
find them duly mustered and arrayed in Browne on S
of Frauds (5th Ed.), sec. 161-c; Throop on Validit
Verbal Agreements, sec. 440-473; and most recently i
Cyc. p. 178.

Upon the whole case, it is not without hesitation
we have reached the conclusion that the case of *Wolve*
v. *Davis, supra,* must be disapproved, and the judgme
the circuit court affirmed.

Affirme

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Syllabus.

Richmond

BERNARD AND OTHERS v. MCCLANAHAN.

November 20, 1913.

Absent, Keith, P.

1. APPEAL AND ERROR—*Objection Below—Personal Judgment.*—Where the only complaint of a defendant is that the judgment rendered against him is a personal judgment, but he took no exception to any of the rulings of the trial court, a writ of error awarded in his favor should be dismissed as having been improvidently awarded.

2. LANDLORD AND TENANT—*Property of Under-Tenant—Liability for Rent.*—The liability of the property of an under-tenant of leased premises for rent contracted to be paid by the tenant does not arise out of contractual relations between him and the lessor, but by virtue of the statute whereby he, upon entering the leased premises as under-tenant, subjects his property carried thereon to liability for rent contracted to be paid by the lessee of the premises, and this liability of his property continues while on the leased premises, and for thirty days after the same is removed therefrom, but it cannot be subjected for a greater amount than one year's rent, due or to become due, from the lessee to the lessor.

3. LANDLORD AND TENANT—*Goods of Under-Tenant—Liability for Rent Due or to Become Due.*—Section 2791 of the Code plainly makes the goods of the under-tenant liable for the rent, just as though they were the goods of the tenant himself; and by section 2962 it is provided that, if the goods are liable to be distrained, they may be attached. The intention of the legislature was to give as effective a remedy for rent to become due as for rent past due.

4. LANDLORD AND TENANT—*Sale of Goods by Tenant—Liability for Rent.*—Although there is no rent due when a lessee sells his entire stock on the leased premises, nevertheless there is a liability on the contract of the lessee for the rent and the goods are taken by the assignee or under-tenant subject to and liable for one year's rent reserved to the lessor in the contract.

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5. ATTACHMENT—*Affidavit—Sufficiency.*—Where it appears upon face of the record that the affidavit for an attachment wa questionably filed in the proper court by the proper offic will not be vitiated by a mere clerical error of the clerk wrote it, in not substituting the words "Law and Chancery "Corporation" in the printed form used by him.

6. ATTACHMENT FOR RENT—*No Pending Action.*—The fact that th tion at law referred to in the clerk's certificate to an attach was never matured for hearing does not render an attach for rent void, for the attachment is good as a remedy fo collection of rent to become due under a contract, whether is an action at law to recover it or not, since the right t out an attachment for rent is not dependent upon a pe action at law to recover the same.

7. ATTACHMENT—*Order of Sale—Personal Judgment.*—An order attachment case which recites that it appears to the satisfa of the court that the defendant is indebted to the plaintif stated sum, and directs a sale of the attached effects, much thereof as may be necessary, to pay the sum so sta not a personal judgment against the defendant, but reaches the goods attached.

Error to a judgment of the Law and Chancery Cou the city of Roanoke in an attachment for rent not Judgment for the plaintiff. Defendant assigns error.

Affirme

The opinion states the case.

Hall & Woods, for the plaintiffs in error.

James D. Johnston, John Izard and *John W. Ca* for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This is a writ of error awarded to W. T. Bernard, Roanoke Hat Company, Inc., and the Bernard-Dupuy C pany, Inc., to a judgment entered by the law and chan

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urt of the city of Roanoke in favor of W. S. McClana-
n, in an attachment proceeding for the recovery of rent.
It was conceded in the oral argument before this court
at the writ of error was improvidently awarded as to the
anoke Hat Company, Inc., and should be dismissed; and
e only complaint of W. T. Bernard is that the judgment
a personal judgment against him, but he took no ex-
ption to any of the rulings of the trial court, and, there-
re, this writ of error was improvidently awarded as to
n also.

The material facts in the case are as follows: By written
ase, defendant in error, McClanahan, rented certain
emises situated in Roanoke city to the Roanoke Hat
mpany for twelve months, from January 1, 1911, to
nuary 1, 1912. In the spring of 1911, the Roanoke Hat
mpany wrote to McClanahan requesting him to make
rtain repairs to the leased premises, and agreeing that if
would do so it, the Roanoke Hat Company, would have
new company, which was proposed to be organized for
e purpose of taking over the business of the Roanoke
at Company, execute a new lease for three years from
tober 1, 1911, at an increased rental. The repairs were
ade and the proposed new company was formed under
e name of the Bernard-Dupuy Company, Inc., W. T. Ber-
rd being its president, but this company refused to exe-
te the lease for three years before mentioned, though it
tered on the premises as an under-tenant of the Roanoke
at Company paying rent at the increased rate to that com-
ny, and that company in turn paying the same rent to
cClanahan, the new company having bought from the
l all of its goods theretofore on the leased premises. This
ndition continued up to and after the expiration of the
iginal lease (which contained no provision for renewal
extension), rent being paid to March 1, 1912, when the
ods theretofore on the leased premises were removed and

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shortly thereafter (within thirty days) the attachm in this case was issued, and was served upon the goods removed in the city of Lynchburg, in the possession of Bernard-Dupuy Company.

The learned judge of the trial court, to whom all n ters of law and fact arising in the case were, by cons of parties, submitted for decision, upon the above fa took the view, "that upon the expiration of the origi term, and the continuance of the possession and paym of rent by the Roanoke Hat Company to McClanahar new tenancy from year to year was created, beginn with the first day of January, 1912. The rent for months of January and February (1912) having b paid, and the vacation of the property amounting t notice of surrender, the amount of rent yet to become pa ble is for ten months remaining of the year 1912."

In accordance with this view of facts, the judgment l complained of was entered, the substance of which is t the plaintiff, W. S. McClanahan, is entitled to reco under his attachment for the amount of rent to become for the unexpired term of the lease, to-wit, for ten mon at the rate of $100 per month, and that the goods le upon under the attachment are liable therefor.

The errors assigned to the judgment raise the questi first, did the court err in its construction of section 2 of the Code of 1904, whereby the writ of attachment held valid as against the goods of the under-tenant, Bernard-Dupuy Company; second, is the judgment a sonal judgment against the Bernard-Dupuy Compa and, third, was the affidavit upon which the attachmen sued defective.

Section 2962 of the Code provides, that "on compl by any lessor, his agent or attorney, to a justice or to clerk of the circuit court of the county or of the cir or any city court of the corporation in which the lea

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emises or any part thereof may be, that any person liable him for rent intends to remove, or is removing, or has hin thirty days, removed his effects from such premises, uch lessor, etc., make oath to the truth of such complaint the best of his belief and to the rent which is reserved hether in money or other thing) and will be payable hin one year, and the time or times when it will be so able, and also make oath that there is not, or he be- es, unless an attachment issues, that there will not be on such premises property liable to distress sufficient to isfy the rent so to become payable, such justice or clerk, the case may be, shall issue an attachment for the said t against such goods as might be distrained for the same t had become payable, and against any other estate of person so liable therefor."

When we turn to the statutes to ascertain what goods y be distrained for rent past due, section 2791 of the le of 1904, very clearly answers the inquiry. In deal- with distress for rent, under the head-line, "On what ds levied," it provides, that "the distress may be levied any goods of the lessee, or his assignee, or under-tenant, nd on the premises, or which may have been removed refrom not more than thirty days."

f the contention of the learned counsel for plaintiffs rror, that there being no privity of contract or contract bility as between the lessor and the assignee, or under- ant, the language of section 2962, limits the right to sue the attachment to a case where a person liable by con- ct for the payment of rent is removing or intends to re- ve the property from the leased premises, could be sus- ned, then much of the language of the statutes providing emedy for the collection of rent might as well have been itted, or should be regarded as meaningless. The lia- ty of an under-tenant of leased premises, as in this case, s not arise out of contractual relations between him l the lessor, but by virtue of statute, whereby he, upon

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entering the leased premises as under-tenant subjects property carried thereon to liability for the rent contra to be paid by the lessee of the premises, and this liab of his property continues while on the leased premises for thirty days after the same is removed therefrom; vided, however, that such goods of the under-tenant not be subjected to the satisfaction of more than one y rent due or to become due from the lessee to the lesso provided by statute. Code, secs. 2791, 2792.

The statute (sec. 2791, *supra*) plainly makes the g of the under-tenant liable for the rent, just as though were the goods of the tenant himself; and by section 29 is provided that if the goods are liable to be distrained, may be attached.

In this case the sale by the lessee of its goods on the le premises to its assignee or under-tenant, the Bernard puy Company, was in gross, and though there was no due from the lessee, at the time of sale, nevertheless, t was a liability on the contract for the rent and the g were taken over by the assignee or under-tenant sul to and liable for one year's rent reserved to the lesso the contract.

The opinion in *Neff* v. *Ryan*, 100 Va. 521, 42 S. E. says: "The principle is elementary and has received repeated approval of this court, that when the rela of landlord and tenant has once been established i taches to all who may succeed to the possession thr or under the tenant, whether immediately or media and the succeeding tenant is as much bound by the acts admissions of his predecessor as if they were his *Emerick* v. *Tavener*, 9 Gratt. 224," 58 Am. Dec. 217.

The argument that to so construe the statutes as to m tain the right of a landlord to attach the goods of an un tenant of the leased premises for rent not due woul a hardship, since under such a construction an under and could not safely carry his goods upon leased prem

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thout making them security for his landlord's rent for e year, is without force, since the same argument might well be made with respect to the hardship of the statute ving the right of distress against the under-tenant's prop- ty for rent due, for when his goods go on the leased emises they become liable to distress for past due rent, t exceeding one year, though it may have accrued before s under-tenancy began. In fact, a greater hardship might ve to be borne in the last-named instance than in the st, for, as said in Burks' Pleading and Practice, p. 12, t will be observed that the landlord may distrain on the der-tenant for the whole amount of the rent due by the ıant, regardless of the state of the account between the ıant and the under-tenant—*e. g.*, if the tenant owes ,000 rent, and the under-tenant has contracted to pay ly $100 for the part of the premises occupied by him, e landlord may levy on the property of the under-tenant ınd on the leased premises for the entire $1,000 rent. ıe statute puts no limit on the extent of the liability of e assignee or under-tenant."

It is clear, we think, that the intention of the legisla- re was to give as effective remedy for rent to become due for rent past due, and the statutes being capable of a nstruction carrying this into effect, the courts must so nstrue them and hold, as did the lower court, that the ods of the under-tenant in this case were subject to the tachment levied upon them.

Neither is there any merit in the contention that the wer court erred in not sustaining the motion of plaintiff error, the Bernard-Dupuy Company, to quash the at- chment on the ground that upon the face of the affidavit ıd attachment it was improvidently sued out and levied ı the goods of the Bernard-Dupuy Company.

The clerk of the law and chancery court and the clerk the corporation court of Roanoke city is one and the

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same person, and the clerk's office of the two courts is and the same. It did happen, as it seems, that the cl wrote the affidavit on a printed form, and the words, the corporation court of the city of Roanoke," appea the top, but nowhere else in the paper. The clerk certi in the attachment, that "Whereas W. S. McClanahan instituted in our court of law and chancery of the cit Roanoke an action on the case . . . against . (naming the defendants), and there having been file our clerk's office of our said court an affidavit that claim of said plaintiff asserted in said suit is believe be just, that the affiant believes that the plaintiff is titled to and ought to recover one thousand, two hund ($1,200.00) dollars for rent reserved and which is able within one (1) year and which is payable month etc. Upon the face of the record the affidavit was, unq tionably, filed in the proper court by the proper officer, his failure to substitute "law and chancery" for "corp tion" court was a mere clerical error as to which plai in error raised no objection in the lower court, and if objection could be raised in this court for the first t we do not think it affords just ground of complaint.

Nor does the fact that the action at law referred t the clerk's certificate was never matured for hearing re the attachment for the rent void, for the attachment good as a remedy for the collection of rent to become under a contract, whether there was an action at la recover it or not, since the right to sue out an attachm for rent is not dependent upon a pending action at la recover the same.

As to the remaining ground of objection to the affid namely, that all persons liable for the rent were made ties defendant, we deem it only necessary to say that record shows that all of the defendants other than Bernard-Dupuy Company had made themselves liable

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e rent claimed in writing, and the Bernard-Dupuy Com-ny was clearly liable therefor as an under-tenant by tue of the statute, as we have already observed.

The remaining question requiring consideration is, did e lower court enter a personal judgment against plain-f in error, the Bernard-Dupuy Company, the only de-dant who did not acquiesce in the court's decision, but cepted thereto, and upon whom notice of the proceeding d not been personally served.

Reading the order of the court complained of as a whole, conforms, as it appears to us, to the usual orders in h cases. So much of the order as is necessary to be oted here is as follows: . . . "the court being of the inion that the plaintiff is entitled to recover under attachment, and that the goods so attached are liable, d it being proven to the satisfaction of the court that the fendants are indebted to the plaintiff in the sum of $1,000 rent reserved by a contract on the premises known as mbers 101 and 103 Commerce street, Roanoke, Virginia, d that the goods levied on in the attachment sued out in s case were removed from the leased premises within rty days preceding the levy of said attachment:

'It further appearing to the court that the sergeant of nchburg, Virginia, has levied on certain goods, wares d merchandise under said attachment, and that the same e now in the possession of the Bernard-Dupuy Com-ny, Incorporated, a corporation in Lynchburg, it is or-red by the court that said sergeant sell said goods levied or as much thereof as may be necessary, as appears by return on said attachment, upon the terms of said con-ct of rental of $100.00 per month for ten months, be-ning March the 1st, 1912, for cash as to amount past e at the time of sale," etc.

Not only has counsel for defendant in error in the argu-nt of the case in this court disclaimed that the order of

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the lower court was, or should be, regarded as a perso judgment against any of the defendants in the attachm proceedings, but the order, in the form usual in such ca when read and construed as a whole, reaches, as we in pret it and as the authorities hold, the goods attac only.

The case of *Griffin* v. *Milwaukee Harvester Co.*, 92 Io 634, 61 N. W. 243, 54 Am. St. 573, is in point. There judgment was in an attachment proceeding against a n resident in the words: "That said plaintiff have and cover judgment against the defendant Griffin, in the s of $134.52, with eight *per cent.* interest on same from t date, and costs in this case, and that the property attac (certain lots) be sold to satisfy said judgment and cos There, as in the case here, objection was made to the ju ment, on the ground that it was a personal judgment, the court in disposing of the objection said: "If the port which directed the sale of the attached property had b omitted, the judgment would have been a personal and, therefore, void, but it stated the amount which Harvester Company was entitled to recover, and tha essential in a judgment *in rem.* As an entirety it is ficient, although perhaps not in the best form, to consti a valid judgment against the land."

In 4 Cyc. p. 824, it is stated: "Some statutes contemp the rendition of a judgment personal in form, even wh no jurisdiction has been obtained over the defendant's p son, and it seems that such judgment will not be deer void in any case, but that whatever the form of judgm it can have no further effect than binding on the prope attached." Wamples on Attachments, p. 511.

Other questions raised in this case, with which we h not specifically dealt, were either waived in the argume or are regarded without merit.

The judgment complained of is affirmed.

Affirmed

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Richmond

BOWMAN v. FIRST NATIONAL BANK OF BROADWAY.

November 20, 1913.

PLEADING—*Joinder of Actions.*—The general rule is that demands against the same party may be joined when they are all of the same nature and the same judgment has to be given in each, although the pleas may be different.

PLEADING—*Amendments—Departure—Endorser and Guarantor.*—A plaintiff may, by different counts in his declaration, declare on the same notes against the defendant both as endorser and as guarantor, hence there is no departure where the original declaration declares against him as endorser, and the amended declaration declares against him as guarantor.

PLEADING—*Amended Declaration—Departure.*—Where an amended declaration asserts rights or claims arising out of the same transaction, act, agreement or obligation as that upon which the original declaration is founded, it will not be regarded as for a new cause of action, however great may be the difference in the form of liability asserted in the original and the amended declarations. The two declarations are regarded as alleging variations in the form of liability to meet the varying phases of the evidence as it may appear.

PLEADING—*Action Against Guarantor—Plaintiff's Title.*—In an action against the guarantor of a note, an averment in the declaration that the note was payable to the defendant, and that "the defendant for a valuable consideration, in writing, undertook, promised and guaranteed the payment" (of the note) "to the plaintiff," necessarily implies that the plaintiff had become and was the owner or legal holder of the note, the payment of which to the plaintiff the defendant had guaranteed, though it would have been better pleading to have averred in terms how the plaintiff became the owner or holder of the note.

EVIDENCE—*Admissibility—Endorsement—Denial—Other Similar Endorsements.*—In an action against a son as endorser of notes made by and discounted for his father, where the facts and circumstances tend to show that the son had full knowledge of the use his father was making of his name, fifty-odd other

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notes, similarly made, endorsed and negotiated, are admis in evidence as tending to show that the father had auth to endorse the son's name on the note sued on.

6. EVIDENCE—*General Reputation—Particular Facts.*—The fact the plaintiff has introduced evidence of a witness' ge reputation for truth does not authorize inquiry as to parti facts which may tend to affect his credibility.

7. BILLS OF EXCEPTION—*Excluding Evidence—Answers Not Given* the bill of exception to the action of the court in excl answers to questions does not show what the answers w have been, it fails to disclose any prejudice to the excepto

8. INSTRUCTIONS—*Jury Fully Instructed.*—Where the jury has fully and sufficiently instructed on every question involved case, it is not error to refuse other instructions tendered, though they correctly state the law.

Error to a judgment of the Circuit Court of Rocking county in an action of debt. Judgment for the plain Defendant assigns error.

Affirme

The opinion states the case.

Bumgardner & Bumgardner and *Conrad & Conrad,* the plaintiff in error.

Charles Winfield, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

The defendant in error, the First National Bank Broadway, brought its action of debt against the plainti error, Sidney L. Bowman, upon two negotiable notes m by Joseph M. Bowman, payable to the order of said Sid L. Bowman, his son, and by him, as alleged in the origi declaration, endorsed to the said bank. To that declarat a plea was filed, in which the defendant denied that he endorsed the notes or authorized anyone else to do Thereupon the plaintiff bank filed an amended declarati in the second and third counts of which it is alleged t

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e defendant, Sidney L. Bowman, for a valuable considera-
n undertook and guaranteed the payment of the said
tes to the bank. The defendant demurred to the amended
claration.

The first and fourth grounds of demurrer assigned are
at the defendant could not be sued in the same action as
dorser and guarantor, and that there was, therefore, a
sjoinder of counts or causes of action.

The general rule is that demands against the same party
ay be joined when they are all of the same nature and the
ne judgment has to be given in each, although the pleas
ay be different. Burks on Pl. & Pr., sec. 456, and authori-
s cited.

Tested by this rule it is manifest there was no mis-
nder in this case.

Another cause of demurrer relied on was that an action
tirely different from that originally sued on was at-
npted to be set up in the amended declaration.

In the original declaration, it is true, the demand as-
rted against the defendant is as endorser, and in the
ended declaration the demand asserted is as guarantor
well as endorser. Both the original and the amended
clarations were based upon the two negotiable notes
ade by Joseph M. Bowman, payable to the order of
lney L. Bowman, and the recovery of the sum evidenced
those notes was the object of the action. The plaintiff
ght have declared against the defendant originally both
endorser and guarantor of the notes, and we know of
reason why he could not amend his declaration and
d counts against him as guarantor of the same notes
ter he had filed his plea denying his liability on them
endorser. Our cases hold that where an amended decla-
tion asserts rights or claims arising out of the same
ansaction, act, agreement or obligation as that upon
hich the original declaration is founded, it will not be

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regarded as for a new cause of action, however great
be the difference in the form of liability asserted in
original and the amended declarations. The two decl
tions are regarded as alleging variations in the form
liability to meet the varying phases of the evidence a
may appear. *New River Min. Co.* v. *Painter,* 100 Va.
510, 42 S. E. 300, and cases cited.

Another ground of demurrer is that, in the cou
against the defendant as guarantor, there are no averm
of ownership of or right to collect the notes.

In these counts it is averred that "the defendant, f
valuable consideration, in writing, undertook, promi
and guaranteed the payment" (of the said notes) "to
plaintiff." It would have been better pleading to h
averred in terms how the plaintiff became the owne
holder of the notes. In each of these counts it is ave
that the notes were payable to the defendant's order,
then follow the averments quoted as to the guara
These averments, taken together, necessarily imply, a
seems to us, that the plaintiff had become and was
owner or legal holder of the notes, the payment of wh
to it the defendant had guaranteed.

The next error assigned is to the refusal of the c
to set aside the verdict as contrary to the law and
evidence.

The evidence tended to show that from the ope
of the plaintiff bank, in the year 1904, to the makin
the notes sued on in the year 1908, Joseph M. Bow
had negotiated in and through the plaintiff bank
notes or more, which purported to have been made b
L. Bowman, in which J. M. Bowman was the payee,
which were endorsed by him; that during the same pe
J. M. Bowman negotiated in and through the plaintiff b
eight or more notes in which J. M. Bowman was
maker and S. L. Bowman was the payee; that the si

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re of S. L. Bowman, whether as maker or endorser on
l these notes, as well as the notes sued on, are in the
me handwriting, and that the officers of the plaintiff
nk believed when said notes were negotiated that the
gnature of S. L. Bowman on each was his genuine sig-
ture; that when the several notes executed prior to
ptember, 1906, approached maturity notice thereof was
nt in due and regular course of business to S. L. Bow-
an by mail, with a request on the envelopes in which
ey were sent to return to the bank if not delivered; and
at none of the notices thus sent were returned; that in
ptember, 1906, when J. M. Bowman was absent from
e State, one of said notes was protested for non-pay-
ent and notice thereof mailed to S. L. Bowman, who in
day or two after protest and before J. M. Bowman had
turned from West Virginia, went to the plaintiff bank in
ference to it and was told that the matter could rest until
M. Bowman's return; that a few days afterwards J. M.
wman settled the protested note with a renewal note
ned and endorsed in the same manner and in the same
ndwriting as to the signatures as was the protested note;
at within ten days after said notice of protest S. L. Bow-
an went to the plaintiff bank again and requested and
structed its cashier thereafter to send notices of the ma-
rity of such notes to J. M. Bowman as they were his to
e care of, and that afterwards notices of maturity were
iled to J. M. Bowman alone; that during the said period
o lines of notes were being run in the bank, one line in
ich S. L. Bowman was maker and J. M. Bowman en-
rser, and the other in which J. M. Bowman was maker
l S. L. Bowman was payee, but J. M. Bowman negotiated
l received the proceeds of both lines of notes; that many
these notes were renewals of former notes; that prior
the death of J. M. Bowman in 1908 all of the J. M. Bow-
n and S. L. Bowman paper had been paid or converted

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into the two notes sued on; that after the death of J
Bowman, who had a high reputation for honesty an
tegrity, his son S. L. Bowman, who seems to have
charge of his estate, went to the plaintiff bank and inqu
what was his father's indebtedness to it, and was sh
the notes sued on, in which he was payee and endo
that he manifested no surprise that his name was
them as endorser, and made no disclaimer as to his li
ity; that before the maturity of each of said notes h
formed the cashier that it was not convenient to tak
the notes at that time, and was told by the cashier
if he would sign the "usual waiver" that he felt sure th
would be all right with the bank, and that it would ex
the time and not press him for an immediate paymen
having stated that he was going to make sale of prop
belonging to J. M. Bowman's estate for the purpos
paying its indebtedness; and that he thereupon signe
following, which is stamped on each of the notes: "Pay
Guaranteed. Protest, Demand and Notice of Non-
ment Waived"; that this was the usual form of waiver
by the bank; that some time afterwards, when it be
apparent that J. M. Bowman's estate would not pa
indebtedness, the defendant denied that he was liabl
the notes as he had neither endorsed nor authorized
one else to endorse or place his signature upon them.
mediately afterwards this action was instituted, but
not pressed until after it was ascertained what am
upon the notes would be realized from the estate of J
Bowman.

The defendant testified that his business and his fat
at the plaintiff bank were entirely separate, and that h
not at any time in any way give authority, genera
special, to sign his name as maker or endorser of the n
his father had discounted at the plaintiff bank, or
which he was borrowing money; that soon after his fat

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ath he went to the plaintiff bank to attend to matters of s own, when his attention was called by the cashier to the tes sued on, and the cashier suggested that he could aive protest; that he did not tell the cashier that the gnature was not his, or that he was not liable on the tes, because he thought that his father's estate would obably pay out, and that he would be able to "settle up e whole matter and keep that a secret to myself; that he terwards agreed to waive protest of the notes and did so, t that he never undertook to guarantee the payment of e notes, and received no consideration therefor, and did t know that there was any statement to that effect in e stamped endorsement which he signed; that afterwards en the cashier was attempting to get him to furnish ad-tional security he disclaimed liability, denying that he d endorsed the notes, or that it had been done with his owledge; that he had never received notices of the ap-oaching maturity of the forty or fifty notes which were t to him as claimed by the plaintiff bank.

The evidence in the case was clearly sufficient to sustain e verdict of the jury if the case was properly submitted them. Two grounds of error are assigned as to the man-r in which the case went to the jury—one as to evidence bmitted and rejected, and the other as to instructions used.

The action of the court in permitting to go in evidence e said fifty odd notes hereinbefore mentioned and de-ibed, negotiated in and through the plaintiff bank by J. Bowman, is assigned as error.

If there had been no evidence tending to show that S. L. wman had notice of the discounting of those notes by his her, their admission in evidence would have been im-per; but under the facts and circumstances of the case ich tended to show that the defendant had full knowl-ge of the use his father was making of his name, that

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evidence was admissible as tending to show that his fa had authority to endorse the defendant's name on the n sued on.

Neither did the court err in excluding evidence Grim, the cashier of the plaintiff bank (who was a ness in the case), sometimes took advantage of his posi as cashier to lend his own money instead of the mone the bank to persons who applied to the bank for lo The fact that the plaintiff had introduced evidence of cashier's general reputation for truth did not autho inquiry as to particular facts which might tend to a his credibility. 1 Greenleaf on Ev., sec. 461.

Even if the evidence sought to be elicited by the q tions set out in bill of exceptions No. 2 as to the irr larities in the manner in which the affairs of the plai bank were managed during the time Grim was cashier been proper, it does not appear that any prejudice resu to the defendant from the action of the court since the of exceptions does not show what the answer to the q tions would have been.

The court refused to give four instructions asked fo the defendant. The rejected instructions were as foll

10. "The court instructs the jury that though the n ber of witnesses who testify to a given fact in a ca greater than the number who testify to the contrary such fact, yet the jury is not obliged to render their ve upon such disputed fact in accord with the testimony o greater number of witnesses, but the jury may accept testimony of one man as against that of several if unde facts and circumstances of the case the jury believe testimony entitled to more weight than the opposing dence.

11. "The court instructs the jury that though (t should believe the preponderance of the evidence sh that when the note for $1,125.00 was protested in Sep

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r, 1905, S. L. Bowman directed the bank to thereafter nd notices to his father and not to him as to maturity of otes on which S. L. Bowman was maker or indorser, yet ch request alone does not entitle the bank to recover on e notes sued on, but may be considered along with other idence in determining whether S. L. Bowman gave thority to another to sign his name to the notes sued on.

12. "The court instructs the jury that the burden of roof rests upon the plaintiff in this case to establish by reponderance of the evidence that S. L. Bowman is liable r the debt sued on and if upon any fact essential to reate such liability the evidence offered by the plaintiff contradicted by equally credible evidence of the defend-nt, then upon such fact the plaintiff has failed to sus-in its burden and they must find a verdict in favor of the fendant.

"The jury is instructed that when a signature is forged, made without the authority of the person whose signa-re it purports to be, it is wholly inoperative and no right retain the instrument or enforce payment thereof gainst any party thereto can be acquired through or nder such signature, unless the party against whom it is ught to enforce such right is precluded from setting up rgery or want of authority; and if the jury believe from e evidence that the signatures 'S. L. Bowman' as en-rser on the two notes sued on were not made by the de-ndant, or were made without his authority, they must id for the defendant."

Conceding that the propositions of law contained in ese instructions were substantially correct, the jury were fficiently instructed upon each one of them by the in-ructions which the court gave without objection, and hich were as follows:

"1. The jury are instructed that forgery creates no legal ght or obligation against the party whose name is forged,

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even though the instrument be sought to be enforced b purchaser for value without notice, and if the jury beli from the evidence that the endorsement of S. L. Bown upon the two notes sued on was not made by him or by authority, he cannot be held liable by reason of such dorsement, notwithstanding they may be of opinion t the plaintiff was a purchaser for value without notice before maturity of the said notes.

"2. The jury are instructed that the defendant, S. Bowman, having by his plea and affidavit denied that either endorsed his name on the said two notes sued or authorized any one else to endorse his name thereon, burden of proof is upon the plaintiff to show that the s endorsement of the name 'S. L. Bowman' upon the s notes sued on was made by him or some one duly authori to put his signature upon the said notes and bind him th on as an endorser on the said notes, and if the jury beli from the evidence that the said S. L. Bowman did not dorse the said notes, did not authorize any one to endo them for him, then they cannot find the defendant liable virtue of such endorsement.

"3. If the jury believe from the evidence that the na of the defendant was used by Jos. M. Bowman, defenda father, now deceased, without defendant's authority in endorsement of the two notes in suit, the defendant can be bound by such endorsements. But if the jury beli from the evidence that, prior to the making and indo ment of the two notes in suit, Jos. M. Bowman had gen authority from the defendant to use his, the defenda name in making and endorsing notes to be discounted the use and benefit of the said Jos. M. Bowman at Broadway Bank, and that such authority continued up and included the indorsement of the two notes in suit, t they should find the defendant bound by said indorseme Authority to bind the defendant by such use of his na

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uld not arise out of the mere failure of the defendant to tify the bank that he disclaimed liability when apprised such use of his name, even if it be true that he was so prised; but if the jury are of the opinion that it is shown the evidence that the defendant knew by notices from e bank or otherwise that his father was in the habit of ing his, the defendant's, name upon paper discounted r his own, the said Jos. M. Bowman's use at the plaintiff's nk and made no disclaimer or repudiation of the same, e jury has the right to consider such failure to disclaim an item of circumstantial evidence, to be weighed along th all of the other evidence in the case bearing on the estion, in determining whether or not Jos. M. Bowman point of fact used the name of defendant as endorser on e two notes in suit with defendant's authority or permission, general or special.

"4. The court instructs the jury that a waiver of the otest of a negotiable note is not a contract and does not ter or in any manner affect the rights or liabilities of e parties, except that it dispenses with the necessity of tice to endorsers of the dishonor of the note, and if the ry believe from the evidence that at any time the words ayment guaranteed, protest, demand and notice of non-yment waived' were put by means of a rubber stamp on e back of the notes in suit and signed by defendant, there as no treaty or agreement by which S. L. Bowman was to sume any new or any different liability on the notes, but e whole intent of the parties as expressed in their conver-tion was to waive the protest, and the defendant signed e same without reading, supposing it to be a waiver of otest only, then the endorsement so stamped on the notes suit and signed by the defendant can be effectual only as waiver of protest and the contractual words 'Payment aranteed' are without binding force to hold the defend-t to liability on said notes.

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"5. The court instructs the jury that a mere nak promise in writing (not under seal) to pay or guaran the payment of an existing debt of another, made with any valuable consideration for such promise, is not bi ing, and, though the jury should believe from the evide that the defendant signed the writing stamped on the ba of the notes, intending thereby to guarantee payment of same, yet, if the jury further believe from the evidence t the original endorsements were not made by the defend or by his authority and that such guarantee was made signed without any valuable consideration either expres or impliedly agreed on at the time, as an inducement such guaranty, the defendant cannot be held liable by r son of the words 'Payment guaranteed' and the jury m find for the defendant on that issue.

"6. Where the consideration for the promise of one pa is the promise of another party, there must be absol mutuality of engagement, so that each party has the ri to hold the other to a positive agreement. Both part must be bound or neither is bound.

"And if the jury believe from the evidence that th was no promise on the part of the bank at the time stamped endorsements on the notes sued on were sig by the defendant, which could be enforced by the defenda such as delay in the enforcing of the collection of s notes, then they must find for the defendant as to his bility as guarantor.

"7. The jury are instructed that if estoppel by the c duct of the defendant is relied on by the plaintiff, party sought to be estopped must have caused the ot party to occupy a more disadvantageous position than would have occupied but for such conduct; and, if the ju believe form the evidence that at the time the defenda S. L. Bowman, signed the stamped endorsement 'Paym guaranteed, protest, demand and notice of non-paym

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aived,' the plaintiff was the holder of said notes, that oseph M. Bowman, the maker of said notes, was dead, id that the plaintiff's rights have not been impaired, nor e prosecution of its rights against the said Joseph M. owman, nor the defendant, S. L. Bowman, prevented by s subscribing to the said stamped endorsement, then the ry are instructed that the said defenadnt is not estopped that act from setting up the defense that the endorse- ent on said notes was neither made nor authorized by him.

"8. The court instructs the jury that the burden of proof the case is upon the bank to prove to the satisfaction of e jury by preponderance of evidence every fact essential place upon the defendant liability for the debt sued on.

"9. The court instructs the jury that they are the sole dges of the weight and credibility of evidence and the ry has the right to discard or accept the testimony or y part thereof of any witness, which the jury regards oper to discard or accept when considered in connection th the whole evidence in the case."

The instructions given covered every question involved the case and submitted the case to the jury as favorably the defendant as he was entitled to have it submitted. ie jury were fully informed by the instructions given that e burden was upon the plaintiff to prove by a prepon- rance of evidence every fact necessary to establish the fendant's liability, and that in considering the evidence the witnesses they were the sole judges of its weight d credibility.

Upon the whole case, the court is of opinion that there no error in the judgment and that it should be affirmed.

Affirmed.

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Richmond

BRIDGEWATER MANUFACTURING COMPANY v. FUNKHOUS COMMISSIONER AND OTHERS.

November 20, 1913.

1. TAXATION—*Assessments—Irregularities.*—Technical objections the time and method of assessing property for taxation unavailing to prevent a proper assessment. A person wh property is liable to assessment for taxes will not be permi to evade the payment of his proportion of the public bur by any errors, omissions or irregularities that do not preju his rights.
2. TAXATION—*Capital of a Miller.*—Capital employed in the busi of a miller is taxable under schedule C, section 8, of the bill of this State.
3. STATUTES—*Construction—Use of Same Word—Tax Bill—"Capital* It is a rule of construction that when the same word is use different parts of the same statute the presumption is tha was used in the same sense throughout the statute, unles contrary intention clearly appears. Applying this rule to tax bill of this State, the word "capital" as defined in section 4 of section 8 was intended to apply also to "capital" used in the preceding sub-sections 2 and 3.
4. TAXATION—*"Capital"—Corporations—Uniform Taxation.*—The w "capital" as defined in sub-section 4, above mentioned, applie well to corporations as to individuals conducting the same b ness. Any discrimination between private persons and corp tions in this respect would violate the constitutional provi that "all taxes, whether State, local or municipal, shall uniform upon the same class of subjects."
5. TAXATION—*"Capital"—What Constitutes—Borrowed Money as C tal.*—The tax laws of this State impose a tax on "moneys credits actively used and employed in carrying on the trad business." If so actively used and employed, it can make difference whether capital or part of it was borrowed or It is none the less capital of the user, and employed for profit and at his risk. While the legislature might have aut ized the deduction of borrowed money from the amount

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capital to be returned for taxation, it has not done so, and such money is to be included in the capital returned for taxation. The capital stock of a company must be clearly distinguished from the amount of capital invested in its business.

Error to a judgment of the Circuit Court of Rockingham unty on a motion to correct an erroneous assessment for xes. Application refused. Applicant assigns error.

Affirmed.

The opinion states the case.

Conrad & Conrad, for the plaintiff in error.

Samuel W. Williams, Attorney General, and *Richard B. wis, Assistant Attorney General,* for the defendant in ror.

HARRISON, J., delivered the opinion of the court.

This proceeding was instituted in the circuit court of ckingham county by the Bridgewater Manufacturing mpany to have corrected an alleged erroneous assessnt of taxes imposed upon it, which relief was denied by e circuit court.

The record shows that the complainant is a corporation, th its chief office and place of business located in Bridgeter, Rockingham county. The chief business of the comny is the operation of two flour mills and one woolen ll at Bridgewater. This company paid for the year 1912 e assessments collectable through the Corporation Comssion, but did not report anything and was not assessed th anything on the personal property assessment books that year. At the November term of the circuit court, special grand jury was impaneled to examine the books assessment as required by section 578 of the Code of

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1904. Among the persons summoned before the gra jury was the manager of the complainant company, who formed the jury that the total running capital of the c pany invested in its business as of July 1, 1912, was $ 703; that of this sum $14,000 was borrowed money; t the company could not tell what amount it had in its b ness as running capital as of February 1, 1912, but tha was not less than it was on July 1, 1912. Thereupon grand jury directed the commissioner of the revenue Ashby district, in which the company and its business located, to assess the company for taxation with $16,7 the amount it had in its business as running capital dur the year 1912. The aggregate tax imposed upon this sessment was $229.64, being $58.45 for State purpo $66.81 for county purposes, and $104.38 for district p poses.

The complainants make several technical objections the time and method of this assessment, insisting tha was not made according to law. These objections are wi out merit. The underlying principle in such cases is t a person whose property is liable to assessment for ta shall not be permitted to evade payment of his just p portion of the public burden by any errors, omissions irregularities that do not prejudice his rights. *Steven* v. *Henkle,* 100 Va. 591, 595, 42 S. E. 672; *Yellow Pop Co.* v. *Thompson,* 108 Va. 612, 62 S. E. 358; *Coles* v. *Jam son,* 112 Va. 311, 71 S. E. 618.

It is clear from the record that the objections are well taken and that the complainant suffered no prejud from the method of assessing the taxes it now seeks avoid.

There is no foundation for the contention that the l does not tax the capital employed in the business of a mil or other manufacturer. That such capital is taxed clea appears from Schedule C, section 8, of the tax bill. Co p. 2193.

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Upon the merits of this controversy, the complainant ntends that under sub-section 3, of section 8, Schedule C the tax bill, Code, p. 2193, the capital taxed is the origi- l capital paid in by the shareholders on the purchase of eir stock, less the amount invested in real estate and the oney borrowed by the company to be used in conducting business. This position cannot be sustained. The nomi- l capitalization of the company which is divided into ares and sold or distributed to shareholders does not cessarily bear any relation or proportion to the actual ount of capital used in the business. A corporation may d often is doing an enormous business with a vast capital ployed, although its stockholders have paid in little or thing. The capital stock of a company must be clearly stinguished from the amount of capital invested in its siness, or the amount of property possessed by it. 1 ok on Corporations, sec. 8.

The third and fourth sub-sections of section 8, Schedule of the tax bill, are as follows:

"Third.—Capital of incorporated joint stock companies t otherwise taxed; and when all of such capital is taxed the State of Virginia, the shares of the stock in the hands individual shareholders shall not be further taxed for ate purposes; but real estate belonging to such com- nies shall not be held to be capital, but shall be listed d taxed as property, and not as capital.

"Fourth.—Capital of individuals invested, used or em- oyed in any trade or business not otherwise taxed. oneys and credits actively used and employed in carry- g on the trade or business; materials, goods, wares and erchandise on hand, and all solvent bonds, demands, or aims made or contracted in the course of business during e preceding year, shall be held to be capital in such trade business, and shall not be taxed otherwise than as such pital; but real estate shall not be listed as such capital, t shall be assessed and taxed as other specific property."

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Sub-sections 2, 3 and 4 of section 8 of the tax bill
deals with capital, sub-section 4 defining the term ca
to be investments "used or employed in any trade or
ness not otherwise taxed. Moneys and credits acti
used and employed in carrying on the trade or busin
materials, goods, wares and merchandise on hand, an
solvent bonds, demands or claims made or contracte
the course of business, during the preceding year, sha
held to be capital in such trade or business, and shall n
taxed otherwise than as such capital; but real estate s
not be listed as such capital, but shall be assessed and t
as other specific property."

The terms *capital* is found in two other sections of
tax bill—that relating to merchants' licenses (Cod
2220), and in the section relating to oyster-packers' lice
(Code, p. 2222)—and in each of these sections the
going definition of capital is repeated. Sub-sections
and 4 of section 8 of the tax bill appear together, an
the last the term *capital,* which is used in each, is defi
There being nothing in the context to show a cont
intention, it would seem to be clear that the meanin
capital, as defined in sub-section 4, was intended to a
also to capital as used in the preceding sub-sectio
and 3.

It is a rule of construction that when the same wo
used in different parts of the same statute, the presu
tion is that it was used in the same sense throughout
statute, unless a contrary intention clearly appears.
tal Tel. Co. v. *Farmville, &c.,* 96 Va. 661, 664, 32 S. E.

To say that the meaning of "capital," as defined in
section 4, applied only to individuals would be to hold
the General Assembly intended to impose a less ta
corporations than on individuals for carrying on the s
business. The provisions of the tax bill under consid
tion furnish no ground for such a conclusion. There i

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ifference between a business as conducted by a corpora-
on and the same business as conducted by an individual
iat would warrant any different meaning to be given to
ie term capital in the two cases. Any such discrimina-
on would be a violation of the requirement of the Consti-
ition, that "all property, except as hereinafter provided,
iall be taxed; all taxes, whether State, local or municipal,
iall be uniform upon the same class of subjects." Va.
onst., Art. 13, sec. 168.

It seems clear that the legislature intended that the
ieaning given by it to the term *capital,* in sub-section 4,
iould apply to corporations as well as to individuals, and
iat it did not mean to limit the taxable capital of corpora-
ons to the original input of the shareholders on the pur-
iase of their stock.

Both sub-sections 3 and 4 of section 8 of the tax bill
rovide, that real estate shall not be held to be capital,
it shall be listed and taxed as property. There is, how-
ver, no warrant in the statutes for the contention that,
arriving at the subject of taxation, the complainant is
ily liable for taxes upon the net balance of capital after
educting the money borrowed by the company to be em-
oyed in conducting its business. Whether or not such
deduction is permissible rests entirely with the legisla-
ire, and is to be determined by reference to the revenue
ws. We find but one instance in which by express pro-
sion of the statute the deduction of debts is allowed.
his occurs in Schedule C, section 8, of the tax bill (Code,
p. 2193-4), where, in taxing bonds, notes and other evi-
ences of debt, it is provided that there shall be deducted
om such choses in action certain indebtedness of the tax-
ayer. In the section relating to merchants' licenses
Code, p. 2220), there might perhaps be an implied allow-
nce arising from the use of the word "net." Neither of
ese instances have any application, however, to the case

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under consideration, as to which the legislature has m
no provision for any deduction whatever. Ordinarily
in common parlance, the word "capital," when used
reference to commerce or trade, including manufacturi
signifies the money and other property adventured in
business. 6 Cyc. 347; 1 Words & Phrases, 954. As s
by the learned judge of the circuit court, when used in t
sense, it can make no difference whether the capital,
part of it, is borrowed or not. It is none the less capi
of the user, and employed for his profit and at his ri
The statute, as already seen, defines what shall constit
capital in any trade or business, and provides that
specifications made shall not be taxed otherwise than
capital. We would be no more justified in reading into
statute a deduction of indebtedness against these spe
cations constituting capital than we would be in makin
like allowance against the value of land or cha
property.

It is illustrated by the evidence in the present case t
large business enterprises are often carried on chiefly,
sometimes wholly, with a borrowed working capital,
if this indebtedness, whether temporary or permanent
to be deducted in ascertaining the capital for taxation, s
enterprises would escape their just share of the burden
government, though they were actually earning la
profits. There is no reason why such a discriminat
should be made in favor of manufacturers and others f
ing in the same class, and there is nothing in the statu
to justify the conclusion that any such favor was intend
The law-making power alone must determine whether s
an allowance shall be made or not in ascertaining the j
amount of taxable property, and, if made, against w
forms of property the deduction shall be allowed and
what extent. As against the capital employed by the c
plainant in its business, the law-making power has

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ided for no deduction of its indebtedness, and the idea hat it intended to do so is negatived by the fact that, in he same statute, a deduction is expressly allowed in tax- ng another and different form of property. *Expressio nius exclusio alterius est.*

There is no error in the judgment complained of, and it s affirmed.

Affirmed.

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Richmond

BURNER v. BURNER.

November 20, 1913.

1. SPECIFIC PERFORMANCE—*Reconveyance—Case in Judgment.*—A brother conveyed to another a lot of land containing fou acres for the consideration of $1,500. The deed provided, ever, that the grantor should within five years from the d the deed go to the grantee and ascertain from him if he satisfied with the transaction, and, if he was, the sale s stand confirmed; but, if he was not satisfied, the grantor w pay the grantee $1,600, and the latter was to reconvey the to the grantor; but, if the grantor could not raise the $ he was to convey to the grantee another parcel of land co ing sixteen acres, and that was to close the transactio week before the five years expired the grantor went t grantee and asked him if he was satisfied with the transa and the grantee replied that he was not, and that the gr could get his money ready. The grantor then, at some t and expense, raised the $1,600 and tendered it to the gr but he declined to receive it, saying he had changed his on the subject and would retain the land. This suit was br to compel a reconveyance of the land.

Held: The grantee had no right under the facts stated to chan mind and refuse to reconvey the land to the grantor, an reconveyance will be compelled by a court of equity.

Appeal from a decree of the Circuit Court of county. Decree for the defendant. Complainant app

Reverse

The opinion states the case.

Walton & Bro. and *R. S. Parks,* for the appellant.

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Leedy & Berry, for the appellee.

CARDWELL, J., delivered the opinion of the court.

David F. Burner, appellant, and William E. Burner, ppellee, are brothers, and in April, 1907, were coterminous nd owners in the Massanutton section of Page county, irginia. In the early part of 1907 appellant was desirous obtaining a loan of $1,500 to meet certain business en- gements, and had arranged for this loan from one Ashby ultz, to be secured by deed of trust on a certain fourteen re tract of land adjoining the lands of himself and ap- llee. About four days after the arrangement agreed on ith Fultz, but before it was consummated, appellant had talk with appellee, telling him of the arrangement with ultz, and in that connection appellee suggested to appel- nt that it might be well for him (appellee) to borrow the oney of Fultz, in which event he would loan it to appel- nt and have him execute a deed to appellee for the four- en acres of land, upon terms and stipulations mutually reed upon. The change in the transaction proposed by ppellee was more desirable to appellant, as he states, first, cause he would be borrowing the money direct from his rother, rather than from Fultz who was of no kin; and, cond, because under the stipulations agreed on with his rother, he (appellant) would have no interest to pay on e loan, as the brother was to take immediate possession the land and crop the same, which crops it was con- dered, by reason of the quality of the land, upon proper ltivation, would afford ample compensation for the loan lieu of the regular payment of interest that appellant ould have been compelled to pay Fultz in the event that e loan was made by him.

Appellee borrowed the $1,500 of Fultz and turned the me over to appellant who contemporaneously—that is, on

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April 20, 1907—executed the deed out of which this lit
tion arises, conveying to appellee, in consideration of
sum of fifteen hundred dollars cash in hand paid, and
covenants of general warranty of title, the said four
acres of land, describing the same as to locality and bo
aries, and stating sources of title, etc., but said deed
tains the following conditions and stipulations:

"It is expressly understood and agreed to by the
ties to this conveyance that the said D. F. Burner s
within five years from the date of this deed go
Wm. E. Burner and ascertain from him whether
is satisfied with this transaction or not. If the
Wm. E. Burner is not satisfied with the said transact
then the said D. F. Burner shall pay him the sum of $1,
in cash, and the said Wm. E. Burner shall reconvey
land herein conveyed to the said D. F. Burner. If the
D. F. Burner shall fail or refuse to pay to the said Wm
Burner the said sum of $1,600, then the said D. F. Bu
agrees and binds himself to convey to said Wm. E. Bu
another tract of land, containing 16 acres of upper l
now owned by him, in addition to the tract herein conve
If the said D. F. Burner shall sell the said 16 acre t
of land within the next five years, he shall not sell it
less than $500, and shall pay over the proceeds thereo
the said Wm. E. Burner, when sold."

There are other conditions specifically set forth in
deed which required appellee to fence and farm the l
properly and trim the apple trees and to observe the r
tion of crops, especiallly as to corn.

Said deed was promptly recorded and appellee im
diately took full possession of the land and has ever s
enjoyed all the benefits derived therefrom. It will be
served that not only was said conveyance of the four
acres of land conditional, but expressly stipulated
within five years from its date the grantor, appell

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ıould have the right to redeem the land and secure a re-
ɔnveyance thereof to him from appellee, provided he went
person "within five years from the date of this deed
April 20, 1907) to appellee and ascertained from him
hether he was satisfied with the transaction or not, and,
the event that appellee expressed himself not satisfied
ith the transaction, then appellant was to pay appellee
,600 in cash ($100 of which was to be a bonus), and upon
e receipt of which appellee was required to reconvey
e land to appellant.

Appellant being desirous and determined to secure a re-
ɔnveyance of said land to him within the five years, pro-
ded he could raise the sum of $1,600 which was necessary
accomplish this purpose, went to see appellee at his
ɔme on the 13th day of April, 1912, which was within five
ars from the date of the said deed and within only seven
ys before the expiration of the said five years, and in-
rmed him as to the object of his visit, and propounded to
pellee the question indicated in said deed, "whether he
ıs satisfied with the transaction," and in reply appellee
ıted specifically and without qualification or evasion,
at "he had the same opinion with reference to the trans-
tion that he had in the first place, and told appellant
get his money ready," meaning, unquestionably, the
600 which it was necessary for appellant to raise in order
secure a reconveyance of the land to him; and within a
v days after this appellant raised the $1,600 by a loan
ɔm a bank in Luray and carried it to the office of ap-
llee's attorneys where he was present, and proposed to
rn over the $1,600 to him upon his reconveyance of said
ıd to appellant; but appellee, though not denying at any
ıe that he had expressed himself as not "satisfied with
e transaction" and told the appellant to get his money
ıdy, refused to receive the money and to execute a re-
ıveyance of the land to appellant, stating at no time any

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reason for his refusal, except, "I have changed my m and intend to keep the land." Whereupon, appellant f his bill in this cause, setting up the facts above recited other facts as to the transaction between himself and brother, appellee, and praying that the latter be require specifically perform his contract with appellant touch the said land in strict conformity with the terms of t contract evidenced by said deed of April 20, 1907.

Upon the hearing of the cause on the bill, the answe appellee therto and depositions taken on behalf of the spective parties, the learned judge of the circuit court tered the decree, which is brought under review in this peal, denying the relief prayed for in the bill, and dismi the same with costs to appellee.

Appellee in his answer to the bill, while not specific denying its allegations, takes the position that the veyance of the fourteen acres of land was a conveyanc an absolute title to the land to him and in no sense inten as a security for the loan of the $1,500 to the appell contending that by the terms of the deed a privilege reserved to him of reconveying the land at the end of years and demanding the repayment to him of the purc money, "but this privilege was accorded to him, and left entirely to his discretion under the terms of said de His answer further states the position of appellee to be he was not obliged to exercise his discretion as to whe he would keep the land or reconvey it to appellant u the end of the five years. He admits that the appel came to him a few days before the expiration of the year period and asked him what he was going to do a it (the land transaction), to which inquiry he then there replied: "I am about of the same opinion that I when the transaction was had, get your money rea "intending further to tell him (while he was under no ligation to do so at that time), that he was satisfied and

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ot expect to reconvey the land, unless some serious acci-
ent happened to the land between that time and the ex-
ration of the said period of five years, such as a flood;
it the said plaintiff immediately left, seemed to get in a
emendous hurry and did not give your respondent time to
y anything in explanation of his jesting remark."

It appears from the evidence that this fourteen acres of
nd was liable to overflow when there was a freshet in
e Shenandoah river, which might result in carrying off
e fertile soil on the land, rendering it of little or no value,
id the view taken by appellee apparently is, that his
other, the appellant, had no rights under the terms of
e deed, but he (appellant) could, up to the last moment
the five years, in case the land by reason of a flood or
om any other cause became of less value or of no value
all declare his dissatisfaction as to the transaction and
row the land back on appellant. As to the statement
at appellant was in such a hurry on April 13, 1912, that
(appellee) did not have time to explain "his jesting re-
ark," appellant when testifying in this cause, after stat-
g that he had heard from several sources that his brother
as dissatisfied with the land transaction, stated: "I was to
to him within five years and ascertain the question,
hether or not he was satisfied, and if he was satisfied it
ould make a clear deed, and if he wasn't satisfied and
rowed the piece of land upon me that I was to go and
ise the $1,600.00 and pay it to him. I did so on the 13th
y of April, 1912. When I went to him I says: 'Willie, I
ve come to ascertain the question whether or not you are
tisfied with the transaction of this land.' He says: 'I
ve the same opinion that I had when we made the deal.'
says, then, I says: 'Willie, then you have throwed that
nd upon me?' and he says: 'Yes sir.' 'Well,' I says: 'then
at settles it.' I waited about two minutes; I started
ght back by Willie Burner, and I says: 'Now, Willie, I

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am going to see whether or not I can raise this money and if I can't raise this money I will come back to you in two or three days from now and go and give you a clean deed for the 16 acres of land that I have mentioned in the deed . . . On the 16th day of April, 1912, I went down by my brother Willie E. Burner's house and asked where he was, and he was over to the barn fixing to come to town I went down to the barn and told Willie Burner that had the money ready to pay him the $1,600 cash that agreed to and I wanted him to come to Luray and make me a deed for the piece of land back. He says: 'I have studied over the matter and I have agreed to hold it.'"

Appellant further states that he then went to the bank in Luray, got the $1,600, and in company with one of his neighbors (who testified in this cause) went at once to the office of appellee's attorneys, where he met appellee and said to him: "Willie, I have the $1,600 here and to count the $1,600 due you according to contract that I have with you. Will you receive it?" and he said "No, sir."

Two witnesses testifying for appellant prove that appellee, before the 13th day of April, 1912, had on two separate occasions declared that he was not satisfied with the transaction had with appellant with respect to the land in question, and intended "to throw it up." J. Daniel Burner, brother of appellant and appellee, testifies that on the same day, April 13, 1912, and after appellant had been to the home of appellee, witness saw the latter and had a conversation with him about this land matter to the following effect: "Now state what that conversation was you had with him there and then?" A. "Well I went to him and told him that I had heard he had throwed up the land on David, and he said. 'Yes, sir.' I said, 'I think it was one of the worst day's work you have done.' He asked me what my authority was, and I told him that different men were waiting to get the land, and I was sorry to see anybody

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else get it." Q. "Did William Burner tell you out plainly that he had thrown the land up and was not going to keep it, and had so told brother David?" A. "He just told me that he had thrown it up and that was all he said when I asked him."

The whole defense of appellee to this suit rests upon his contention that he was actually entitled to hold said land for five years from the date of the deed, and in the meantime was not compelled to say whether he was satisfied or not, although that question was asked him by appellant. The fact that he did speak and exercise his right of option reserved to him in the deed when approached on the subject April 13, 1912, is wholly inconsistent with the contention he is now making. He doubtless might have said, and with propriety and reason, to appellant, "I have till the last day of the five year limit to say whether I am dissatisfied and prefer to give up the land according to the terms of the deed," which privilege he did not exercise, but instead, as he admits, replied, "I am about of the same opinion that I was when the transaction was had; get your money ready," clearly meaning that he was dissatisfied and intended to reconvey the land to appellant and get the $1,600 stipulated for in the deed.

Whether the change of appellee's mind is due to not realizing an expectation that appellant could not raise the $1,600, in which event he would be entitled to a conveyance of the additional sixteen acres of land, or to information that had come to him that the fourteen acres was worth more than the $1,600, as the evidence in this cause clearly proves, is immaterial. The deed in question was doubtless written by a layman, and the terms of the agreement it purported to set out are not very clearly stated, but from a reading of the whole deed it is to be ascertained that it reserved to the grantor (appellant) certain rights in the land conveyed, including an option to

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take a reconveyance of the land to himself upon his payi to the grantee (appellee) $1,600, provided that appel when approached on the subject within five years fr the date of the deed declared that he was not satisfied w the transaction recited therein.

It seems to us entirely reasonable that appellant w to appellee several days before the expiration of the years to ascertain from him whether or not he was satisfi for if he declared himself dissatisfied and proposed "throw up" the land upon appellant, the latter was entit to a reasonable time to raise the necessary money to p form his part of the contract, and the time he gave hims to accomplish that purpose was, we think, entirely reas able. When appellee answered the question put to h by appellant on April 13, 1912, as he did, it was clea the right of appellant, reserved to him by the terms of deed, to then and there exercise his option to pay appe the $1,600 and call for a reconveyance of the fourt acres of land to him. By the deed of the fourteen acre land to appellee, it was made the imperative duty of pellant to go to him within five years and ask him if he satisfied with this land transaction; and this having b done within a reasonable time before the expiration of time limit, and appellee having declared himself dissa fied, and after appellant had, at some expense and trou raised the necessary money for him to carry out his opt to take the land back, it would be unjust and contrary equity and good conscience to permit appellee to cha his mind, and refuse to reconvey the land to appellant

We are, therefore, of opinion to reverse the decree pealed from, and to remand the cause for further proc ings to be had therein in accordance with the views he expressed.

Reversed

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Richmond

CHESAPEAKE AND OHIO RAILWAY COMPANY v. RUCKMAN.

November 28, 1913.

1. CARRIERS—*Interstate Commerce—Special Contracts to Expedite Delivery of Interstate Shipments.*—A special contract with a particular shipper, whereby a carrier agrees for the published rate to expedite an interstate shipment of freight and deliver the same on a designated day, gives to the particular shipper an advantage over other shippers and makes a discrimination in his favor which is prohibited by the interstate commerce act, and hence such a contract is void.

Error to a judgment of the Circuit Court of Augusta county in several actions of assumpsit heard together. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The plaintiff, D. G. Ruckman, instituted four separate suits in the circuit court of Augusta county against the defendant railway company to recover damages for the alleged negligence of the defendant in failing to deliver four shipments of cattle in time for a certain market. The four cases were, on motion of the defendant, heard together as one case, and upon a demurrer to the evidence by the defendant a single judgment was rendered in favor of the plaintiff for the damages ascertained by the jury.

These shipments were made by the plaintiff from Bartow, West Virginia—three of them to Jersey City, N. J., and one to York, Pa. The defendant company contends that no valid contract for the delivery of the cattle was either alleged or proven, and that it was only under obli-

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gation to use ordinary diligence to deliver them in a reaso able time. The allegations of the declaration are th the said live stock was shipped by and with the knowled and consent of the defendant, and at its special instan and request, for sale on Friday's market next after t shipment, and that the damage resulted from the defen ant's default in not delivering the cattle in time for th market.

The evidence sustains these allegations. The plainti testifies that in each instance he notified the defenda that he desired to make the shipment; that he stated t time and place at which he wished cars placed for t receipt of the cattle, and named the date on which wished them to arrive at their destination and the reas therefor; and that in compliance with his request t transportation was provided and the cattle went forwar

The allegations of the declaration and the proof su taining them establish a special contract for the delive of the cattle on the day agreed upon.

What the plaintiff sought, and what was accorded hi in the trial court, was damages for the breach of t special contracts for the delivery of the cattle on desi nated days—a special arrangement with him not publish by the carrier and not open to other shippers. The ra charged was the regular published rate for like shipmen to other shippers.

In *Chicago & Alton R. Co.* v. *Kirby*, 225 U. S. 155, Sup. Ct. 648, it is held that a carrier may enter into co tracts to expedite shipments and charge a higher ra therefor, but to do so it must make and publish a ra open to all. It was said that the broad purpose of the co merce act was to compel the establishment of reasonab rates and their *uniform application*, and that such pu pose would be defeated if sanction were given to a speci contract by which there was guaranteed to a particul

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ipper a particular connection and transportation by a rticular train, as this would give to the particular ship- r an advantage and preference not open to all and not ovided for in the published rates—an advantage to the ipper and a discrimination in his favor prohibited by the terstate commerce act, although no extra charge was ade for the service.

J. M. Perry, for the plaintiff in error.

Landes & East, for the defendant in error.

The following order was entered by the court:

IRGINIA:

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of Augusta county on the 20th day of April, 1912.

This cause, which is pending in this court at its place session at Staunton, having been fully heard, but not termined at said place of session, this day came here the rties, by counsel, and the court having maturely con- dered the transcript of record of the judgment aforesaid nd arguments of counsel, is of opinion, for reasons stated writing and filed with the record, that said judgment erroneous and should be reversed upon the authority of *hicago and Alton Railroad Company* against *Kirby,* 225 nited States Reports 155, 32 Sup. Ct. 648.

It is therefore considered that the same be reversed and nnulled, and that the plaintiff in error recover of the efendant in error its costs by it expended in the prose- ution of its writ of error and supersedeas aforesaid here.

And this court, proceeding to enter such judgment as he said circuit court ought to have entered, is also of the

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opinion that the law arising upon the demurrer of
defendant to the evidence of the plaintiff is for the
fendant, that the said evidence is not sufficient to maint
the issue joined on the part of the plaintiff; therefore
is further considered that the said demurrer be sustain
that the plaintiff take nothing by his bill, and that
defendant go thereof without day and recover against
plaintiff its costs by it about its defense in said circ
court expended.

Which is ordered to be entered in the order book h
and forthwith certified, together with a certified copy
the opinion in this case, to the clerk of this court
Staunton, who will enter this order in the order book th
and certify it to the said circuit court.

Reversed

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Richmond

CROGHAN v. WORTHINGTON HARDWARE COMPANY.

November 20, 1913.

CONTRACTS—*Sale of Land—Statute of Frauds—Letter Accepting Offer.*—A letter written by the owner of land, in reply to a written proposal to purchase, saying, "I accept the offer you made me for $1,500 cash," and signed by such owner, is a sufficient compliance with the statute of frauds.

PRINCIPAL AND AGENT—*Transmitting Proposal to Principal—Agent for Both Parties.*—An agent to sell land may, with propriety, transmit to his principal for his acceptance or rejection the offer of a proposed purchaser. This is not acting as agent for both parties in the purchase and sale of the land.

Appeal from a decree of the Circuit Court of Rockbridge unty. Decree for the complainant. Defendant appeals.

Affirmed.

The opinion states the case.

Charles & Duncan Curry, for the appellant.

Fitzhugh Elder, for the appellee.

KEITH, P., delivered the opinion of the court.

The appellant was the owner of a house and lot in aunton, which she listed with the firm of Tannehill & cCray, real estate brokers, for sale, at the price of ,000. A short time after the property was placed in their nds, Tannehill & McCray wrote to appellant that they d a cash offer of $1,200 for the property, which she

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declined to take, and some time thereafter they again wr
to her, stating that the person who had offered $1,200
increased his offer to $1,500 cash, and in this letter the
estate agents stated that "the property is in a bad co
tion, and is full of very bad tenants. Only a few days
they were up in the police court and heavily fined
keeping a disorderly house. In our opinion, this ho
will never be very desirable for a residence, and consi
able money will have to be spent to make it into a w
house." Relying upon the representation that the prope
was in bad condition and depreciated in value, she wr
Tannehill & McCray as follows:

"I accept the offer you made me for $1,500.00 c
Thanking you, I am,

"Respectfully,

"MRS. ANNA CROGHAN.

Before the sale was closed, Mrs. Croghan went to Sta
ton, examined the property and made inquiries about
and found, as she claims, that the property was not
such condition as the agents had represented; that it
in good condition and repair, and was worth a good
more money than she had been offered for it, and that
the market, at public auction, it would have brought f
$2,200 to $2,500; and she declined to close the s
Thereupon suit was instituted at the March term, 1
of the circuit court of Rockbridge county by the
chaser, the Worthington Hardware Company, to comp
specific performance of the contract.

The demurrer and answer of the defendant sets up
defenses: First, that no written memorandum of sal
the real estate in the bill mentioned is shown by the
In other words, she relies upon that provision of the stat
of frauds which provides that "no action shall be brou

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pon any contract for the sale of real estate unless some emorandum or note thereof be in writing and signed by ie party to be charged thereby or his agent." At the earing, however, this ground of defense was very properly bandoned, as the letter from Mrs. Croghan, just quoted, a sufficient compliance with the statute.

The second ground of demurrer is that Tannehill & cCray were acting as agents both for the complainant nd the respondent without it being made to appear from ny averment in the bill that they were so acting with the telligent consent of both complainant and respondent. his defense will be more fully dealt with when we come consider the proofs in the cause.

A number of depositions were taken by the plaintiff and efendant, with the result that the court entered a decree accordance with the prayer of the bill, specifically en rcing the contract, and from that decree this appeal was warded.

Looking to all the facts of the case, we are of opinion at there is no merit in the defense based upon the propotion that Tannehill & McCray were agents for both the uyer and the seller. It is true that in their depositions oth Tannehill, one of the agents, and Worthington stated at the real estate firm were the agents of the hardware mpany, if we look merely to an isolated question and nswer; but when their depositions are considered as an ntirety, and we perceive just what idea the witnesses ean to convey, it is plain that they merely mean to say at the firm of Tannehill & McCray, who had been emoyed by appellant to make sale of the property, and with hom she had listed it for sale, were also the agents of e Worthington Hardware Company to this extent, and this extent only, that they were to transmit the offer the purchaser for acceptance or rejection to Mrs. roghan. In this there was no impropriety.

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The principal question in this case grows out of the ments in the letter from Tannehill & McCray to Croghan, in which they inform her that her property bad condition and is full of very bad tenants, who recently been heavily fined in the police court for ke a disorderly house. We have carefully considered th dence bearing upon this matter, and we think that it warrants the statements and representations as to th dition of the property in question, and the statement the character of tenants by whom it was occupied is borne out by the proof.

Upon the whole case we are of opinion that no or imposition was practiced upon Mrs. Croghan, actual or constructive; that the contract was fairly en into with a purchaser who was ready, able and willi comply with its terms, and that the decree of the co tion court specifically enforcing it should be affirme

Affirm

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Syllabus.

Richmond

DAVIS v. COLE BROTHERS.

November 20, 1913.

Absent, Buchanan and Whittle, JJ.

EVIDENCE—*Writing—Original—Copy.*—A paper offered in evidence as a copy appearing in fact to be the original, the objection to the introduction of the copy until the original was accounted for was properly overruled.

EVIDENCE—*Admissibility—Introducing Same Evidence—Waiver.*—An objection to the introduction of evidence is deemed to have been waived where the same fact is testified to by the objector himself.

WITNESSES—*Cross Examination.*—In an action against the makers of notes given for the purchase price of personal property, and secured by a deed of trust on said property, after one of the original parties to the transaction has testified that the property had been advertised for sale under the deed of trust and that he was present with money to buy it, but the property was not offered, it is not error to ask him on cross examination how much money he had for that purpose at that time, where he got it from, and what he did with it.

WITNESSES—*Cross Examination—Foundation for Impeachment.*—In order to lay the foundation for attacking the credibility of a party witness, it is not error to permit him to be asked, on cross examination, if he had not given the plaintiff, as collateral for the notes in suit, a note signed by his grandfather, which the latter afterwards said was not signed by him, and was a forgery.

EVIDENCE—*Collateral Facts.*—Nor is it error to prove the same facts about the giving of the collateral note and its repudiation by a surety on the notes who was to be relieved of liability if the collateral note was accepted, or by a payee of the notes in suit.

EVIDENCE—*Principal and Surety—Admissions—Case at Bar.*—In an action against principal and surety on notes given for a saw-mill, where the surety claims that, after his principal had failed to pay, he bought the mill of creditor, who failed to deliver it,

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and the creditor denies such sale and claims that the was always interested in the purchase because he ha timber to the principal, who was to manufacture it use of the mill, and that he signed the notes as surety it was not error to prove by the admissions of both parti the surety had sold to his principal standing timber former's land before the principal had bought the sawn

7. EVIDENCE—*Letters—Replies as Evidence of Receipt.*—A repl letter of a given date is sufficient evidence of its receipt out evidence that it was properly addressed and postag thereon.

8. EVIDENCE—*Improper Reception—Harmless Error.*—The im admission in evidence of copies of letters of such natur their admission in evidence could not have prejudiced the objecting thereto nor have influenced the verdict of th does not constitute reversible error.

Error to a judgment of the Circuit Court of R county in a proceeding by motion for a judgmen money. Judgment for the plaintiffs. One of the d ants assings error.

Affirm

The opinion states the case.

W. W. Bird, H. L. Kidd and *S. B. Quillen,* for the tiff in error.

Finney & Wilson, for the defendants in error.

KEITH, P., delivered the opinion of the court.

In this cause we are called upon to review the pr ings upon a notice filed in the circuit court of R county by Cole Brothers against C. B. Smith, J. K. and J. W. Davis. Neither of the Smiths filed any pl that Davis is the only active defendant. The claim a him was based upon three notes, each for the sum of part of a series of six notes, three of which were n

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when the suit was instituted, and which were given for the purchase price of a saw-mill, with the various attachments belonging to it.

Davis filed a special plea, which is sufficiently stated by him in his petition as follows: That Cole Brothers sold to Davis "the saw-mill in the plea described, in consideration that he would sign and assume payment of the notes sued upon, less $150; that they failed to deliver him the saw-mill, in consequence of which he was damaged, and which damage he offers to set off," etc., to which plaintiffs replied generally.

The petition further states that the errors mainly relied upon by petitioner to obtain a reversal of the judgment against him grow out of rulings made by the judge in the admission of certain letters.

The first bill of exception relates to a question asked the defendant, J. W. Davis, when testifying in his own behalf. After giving in full his version of the transaction, he goes on to say that H. C. Cole, one of the defendants, gave witness a paper at Bristol certifying that he (witness) was to have credit on the notes for $150; that witness objected to the way the paper was written; that Cole said to witness, "You sign the notes and I will deliver the mill—put you in possession of the mill"; that Cole signed the paper; that witness objected to the paper and did not accept it, but took the paper; that Cole said the paper would give witness credit for $150, and that he (Cole) would give witness possession of the mill, and that he would come shortly and deliver the mill; that witness was to pay $1,500 for the mill; that the mill had been on witness' place from May until October; that it had not been hurt; that witness did not suppose that the Coles would charge him interest until they turned him over the mill; that the paper above referred to was written by H. C. Cole; that he guessed that the paper could be found;

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that H. C. Cole wrote and handed him a paper that lo
like a copy of the paper handed him by plaintiff's cou
and that he (witness) thought it was a copy of the p
Cole wrote and handed to witness. After the introduc
of this testimony, plaintiff's counsel offered to rea
evidence to the jury said copy, and avowed that plai
would prove by further evidence the paper to be a
copy, which is in the words and figures following, to-

"In consideration of J. W. Davis endorsing four
for $275 each, dated April 7, 1911, and due as foll
One due July 20, 1911; one October 20, 1911; one Jan
20, 1912, and one April 20, 1912, executed by C. B. S
and J. K. Smith for saw-mill outfit, we hereby agr
give $150 credit on note for $275, dated April 7,
and due July 20, 1912, when the series of six notes exec
for the saw-mill outfit by above Smith Brothers are
in full.

"This October 25, 1911.

"COLE BROTHERS

To the reading of this copy the defendant, by cou
objected. The court overruled the objection, and there
the defendant excepted.

H. C. Cole, one of the defendants in error, referri
the paper which is the subject of the exception under
sideration, says that he drew up a paper showing the t
action between them and handed the same to Davis, re
ing a copy, being the same paper that was read in evid
to the jury over the defendant's objection and set o
bill of exceptions No. 1; that J. W. Davis took the p
and made no objection to and did not object to receivi
It appears, therefore, from the evidence of Cole tha
paper given to Davis, and the reading of which wa
cepted to, was not a copy, but the original, and the acc
given by H. C. Cole does not at all contradict, but r

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confirms the statement made by J. W. Davis in his testimony, and there was no error in allowing the paper to be read in evidence.

Bill of exceptions No. 2 is taken to the ruling of the court permitting the witness, J. K. Smith, to answer the following question: "The saw-mill was advertised under deed of trust for sale, wasn't it?" to which he replied: "Yes, the saw-mill was advertised. We were there with the money to pay for it on the day it was to be sold, but nobody was there to sell the mill, though."

This question and answer could not have injuriously affected the plaintiff in error, and, in addition, the same fact is testified to by the plaintiff in error himself. The assignment of error is overruled.

Bill of exceptions No. 3 is taken to a question asked J. K. Smith, as follows: "How much money did you have to pay for the saw-mill on the day it was advertised to be sold, where did you get it from, and what did you do with it?" To which question and the answer of the defendant showing the source from which he claims to have derived the money with which to pay for the mill the plaintiff in error excepted.

The question was asked upon cross-examination of one of the original parties to the transaction, and we think it was properly admitted by the court, and this assignment of error is overruled.

The fourth bill of exceptions was to the following question asked J. K. Smith upon his cross-examination: "Did not you give Mr. H. C. Cole, as collateral to secure the notes sued on, a note signed by your grandfather, Thomas Smith, and did not your grandfather afterwards say that he never signed the note, and that his signature to the note was a forgery?" To this question the defendant, by counsel, objected; the court overruled the objection and allowed the question to be answered, as follows: "We told

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Mr. H. C. Cole we would give him a note signed by ou grandfather, Thomas Smith, who lives in Scott county, Va as collateral to secure the notes sued on. We sent this no to our grandfather to sign and then sent it on to Co Brothers. We sent him the note to sign, and, after sig ing it, to send it to Cole Brothers, and I never saw th note any more. Mr. Cole told me that Thomas Smith sai he never signed the note. I think my brother, C. B. Smit has the note. I don't know how he got it back—wheth he got it from Mr. J. W. Davis or not."

This was admissible, if for no other reason, to lay th foundation for attacking the credibility of the witness, an the assignment of error to its admission is overruled.

Bill of exceptions No. 5 is taken to the ruling of th court permitting a letter to be read in evidence whic was addressed by Cole Brothers to the Smith Brother The bill of exceptions is as follows:

"Be it remembered, that upon the trial of this cau and after the introduction of the evidence and the ruli of the court as set out and shown in bill of exceptions N 1, in bill of exceptions No. 2, in bill of exceptions No. and in bill of exceptions No. 4, the witness, J. K. Smit on his further cross-examination by plaintiffs by couns was offered by plaintiffs copies, or what purported to copies, of two letters written by Cole Brothers to Smi Brothers, under dates of October 30, 1911, and Novemb 27, 1911, which were handed to the witness by counsel f plaintiffs. And thereupon counsel for the plaintiffs re to the witness before the jury what purports to be a co of a letter purporting to have been written by Cole Brothe to Smith Brothers, dated November 27, 1911, and whi is in the words and figures following, to-wit:

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'November 27, 1911.

'Messrs. Smith Brothers,

'Castlewood, Va.

'Dear Sirs:

'Answering yours of 20th instant, sorry that we cannot help you and Mr. Davis further than we have.

'We have laid out of our money all summer, have two notes past due, and have been out of money and time without receiving a cent in return.

'If you cannot deal with the lumber firms with whom you have been in touch, we would not know where to cite you.

'We did tell Mr. Davis if he would get up the money and pay off the whole debt, we would give him $150.00 off, and he said he would give you the benefit of the rebate if you got it paid.

'We do not know of any one who would take the outfit off your hands and pay us, and we are sorry we cannot take it off your hands ourselves. We have advertised your outfit twice, and we will say to you frankly, the next time it goes, and we cannot hold but a short time longer. Trusting you can help us, we are,

'Yours truly,

'COLE BROTHERS.'

"This being the same copy offered and read to jury, as shown hereafter in defendant's evidence.

"To the reading of which letter in evidence before the jury the defendant, by counsel, objected because no defense was being made to this suit by Smith Brothers and because the Davis transaction was an independent transaction from the one with Smith Brothers; and the court thereupon overruled said objection and permitted said letter to be read in evidence before the jury, and the defendant then and there, before the jury retired to consider of their

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verdict, excepted, and tenders this, his bill of excepti
No. 5, and prays that the same may be signed, sealed a
made a part of the record, which is accordingly done t
the 19th day of October, 1912."

It will be observed that the objection to the reading
the letter is not put upon the ground that it was a co
and no foundation had been laid for its introduction.
objection rests upon the proposition that no defense
made to the suit by Smith Brothers, and because the Da
transaction was an independent transaction from the
with the Smith Brothers. We think that the contents
the letter itself show the propriety of its being introdu
before the jury, and this exception is overruled.

The sixth bill of exceptions sets out that Davis, be
recalled as a witness for further cross-examination,
asked the following question: "Did not Smith Broth
send to Cole Brothers, as collateral security, a note p
porting to be signed by their grandfather, Thomas Sm
as security, which note Thomas Smith never sign
and which he said his name had been forged to, and
not Mr. H. C. Cole afterwards hand you this note to
returned to Smith Brothers, and did he not say to
in handing you this note that he had taken the note
Thomas Smith, and that Thomas Smith had said that
never signed the note and repudiated it as a forger
And to this question the witness gave the following answ
"After the controversy between Mr. H. C. Cole and my
as to which notes I signed, Mr. Cole told me that he wo
give Smith Brothers a note for $550.00, and if they wo
get their grandfather, Thomas Smith, to sign the sa
with them, as security, he would take it in the place
the notes I had signed and release me. He afterwa
told me that he had given them the note; that it had b
sent to him with Thomas Smith's name signed to it; t
he became dissatisfied with it; that he went to see Thom

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Smith about it; that Thomas Smith said that he did not sign the note and repudiated it; Mr. Cole then brought the note to me to give to Smith Brothers, and prepared a new one for the same amount, and requested me to go with Smith Brothers to get Thomas Smith to sign same and witness the signature of Thomas Smith, and then forward the note to Cole Brothers, and notify them at once if the matter was so arranged. I gave Mr. H. C. Cole a receipt for the first mentioned note, which he said Thomas Smith had repudiated, and returned the note to Smith Brothers as requested; and I tried to get C. B. Smith to go with me down to his grandfather's to get him to go on the note. He did not go; said that his mother was sick and he could not leave her. I then wrote to Mr. Cole that I could not get the note fixed. The Thomas Smith note was to release me on the two notes I had signed for Smith Brothers as security." The plaintiff in error, by counsel, excepted to the question and answer, and its admission by the circuit court constitutes an assignment of error.

We think that the ruling speaks for itself, and this assignment of error is overruled.

H. C. Cole, having been introduced as a witness for the defendants in error, was asked the following question: "After the mill was advertised for sale, did Smith Brothers give you a note with their grandfather, Thomas Smith, as security, for the sum of $550.00, which note Thomas Smith repudiated as a forgery?" Cole then goes on to give substantially the same recital with respect to this transaction that we have just set out in the statement made by Davis; and this assignment of error is also overruled.

The ninth bill of exceptions shows that H. C. Cole, upon his examination, was asked the following question: "Do you know whether J. W. Davis had sold Smith Brothers any timber?" to which he replied: "I understood from J.

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W. Davis and Smith Brothers that J. W. Davis sold ber to Smith Brothers for $2,000." To the question answer objection was made, which was overruled b court, and the plaintiff in error excepted. We thin evidence was proper, and the assignment of error is ruled.

The subject of the tenth bill of exceptions is as fol H. C. Cole, being on the stand, proved that he had m to Smith Brothers two letters, one dated October 30, and one dated November 27, 1911. The letter date vember 27, 1911, was the subject of bill of exception 5, and the propriety of reading it before the jury was decided. The letter of October 30, 1911, which is other letter embraced in bill of exceptions No. 10, is p by Cole to have been written by him and address Smith Brothers at Castlewood, Va. It is not specif stated that Castlewood, Va., was the postoffice of S Brothers, or that the proper postage was placed upo letter, nor was any objection made on these grounds. bill of exceptions only states a general objection wi stating any reason whatever. Under date of Castle Va., November 20, 1911, Smith Brothers addressed a to Cole Brothers, which is a reply to their letter of Oc 30, 1911. We are of opinion that there was no err the ruling of the court in this respect, and this assign of error is overruled.

Bill of exceptions No. 11 sets out copies of a numb letters written by Cole Brothers to Davis. The chiefly letters urging a settlement of their demands him, and are proved to be copies of letters writte mailed to J. W. Davis, none of which were replied cept those of October 24, 1911, and December 12, and which are the same letters set out in the bill of tions No. 2, in which Davis promises to do what h to meet his obligations. It is safe to say that their a

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sion could not have prejudiced the plaintiff in error or have influenced the verdict of the jury.

The twelfth assignment of error is to the refusal of the court to set aside the verdict of the jury and grant a new trial. We are of opinion that the evidence fully warrants the verdict, and that there is no error in the judgment complained of, which is affirmed.

Affirmed.

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Richmond

DENNIS v. JUSTUS AND OTHERS
AND
W. M. RITTER LUMBER COMPANY v. JUSTUS AND O

November 20, 1913.

Absent, Buchanan and Whittle, JJ.

1. EQUITY PLEADING—*Bills—Multifariousness—Dismissal With*
jection.—It is the duty of the court, of its own mo
dismiss a bill that is multifarious, although not objecte
that ground by the parties defendant; hence it is imi
that only one of two defendants demurs on that accoun
2. EQUITY PLEADING—*Bills—Multifariousness—What Constit*
bill is multifarious when there is improperly joined in
distinct and independent matters, thereby confounding
as, for example, the uniting in one bill of several matt
fectly distinct and unconnected against one defendant,
demand of several matters of a distinct and independent
against several defendants in the same bill. In the lat
the proceeding would be oppressive, because it would
load each defendant with an unnecessary burden of
swelling the pleadings with the statement of the severa
of the other defendants with which he has no connec

Appeal from a decree of the Circuit Court of Buc
county. Decree for the complainants. Defendants a

Rever

The opinion states the case.

S. M. B. Coulling, M. O. Litz and *J. W. Flanaga*
for the appellants.

Chase & Daugherty and *A. A. Skeen,* for the app

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KEITH, P., delivered the opinion of the court.

For the purposes of this case the averments of the bill may be stated as follows: That Daniel Blankenship was the owner of a tract of sixty acres of land, in the county of Buchanan, which he conveyed by deed to one of the predecessors in title of J. L. Justus; that by intermediate conveyances from divers grantors the title to this land was vested in J. L. Justus, the father of complainant, who by his deed conveyed it to Melvin Justus and his brother, Ephraim Justus; and that by proceedings in a chancery suit this land was sold and conveyed to John C. McCoy by J. H. Stinson, a special commissioner, and by McCoy's deed title untimately vested in the complainant, Melvin Justus, whose deed went to record prior to the first of January, 1901; that the land was improperly assessed for taxation against J. L. Justus, father of complainant, for the year 1901; and that by proceedings which need not be specifically stated, it was sold for taxes alleged to be due by J. L. Justus; the Ritter Lumber Company became the purchaser, and a deed was made to it by Joseph Hibbits, the clerk.

Without going into details, we will content ourselves with the statement that the averments of the bill make out a case for relief against the Ritter Lumber Company, and that if those averments were established by proof the deed from the clerk should be set aside as improperly constituting a cloud upon complainant's land.

The bill goes on then to state that W. L. Dennis, on the 8th of September, 1908, filed an *ex parte* petition before J. E. Williams, commissioner, acting under sections 3340 and 3341 of the Code, to set up title in himself to the sixty acres of land derived by complainant, as aforesaid, from Daniel Blankenship; that W. L. Dennis claims title under a deed of trust from Daniel Blankenship to J. H. Stinson,

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trustee, dated February 27, 1894, and recorded the fo
ing day, a deed from J. H. Stinson, trustee, to J. F. Ba
and by deed from J. F. Barnes and her husband W
Dennis, dated June 23, 1903. The bill alleges that
of these deeds included or intended to include the
acre tract of land owned by him, and if the avermen
the bill be true a case for relief is made by the pla
against W. L. Dennis.

The prayer of the bill is that the Ritter Lumber
pany, W. L. Dennis, J. L. Justus and Ephraim Just
made parties defendant; that a decree may be en
vacating and declaring void the deed from Joseph Hi
clerk, to the Ritter Lumber Company, for the reasons
inbefore set out; and that an order may be entere
straining the said W. L. Dennis from proceeding an
ther with his petition before Commissioner Williams.

We have, then, a bill which sets out the plaintiff's
to a sixty acre tract of land, which he seeks to protect
the claims of the Ritter Lumber Company under
deed, and from W. L. Dennis, who is proceeding to esta
title in himself to this tract of land by proceedings bef
commissioner by virtue of the statute hereinbefo
ferred to.

The bill was demurred to as being multifarious; th
murrer was overruled; the defendants answered; de
tions were taken and proofs filed; and the court b
decree which is appealed from granted the relief so
vacated the deed from Joseph Hibbits, clerk, and restr
Dennis from proceeding any further with his petitio
fore Commissioner Williams.

The first error assigned is that the demurrer to th
was overruled, and the appellee contends that the cl
of multifariousness was not set forth with sufficient
ness as a ground of demurrer by the Ritter Lumber
pany, and was not relied upon by W. L. Dennis, in

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rcuit court, Dennis and the Ritter Lumber Company ing the only appellants.

This contention need not be passed upon, as the charge of ultifariousness made by the Ritter Lumber Company is fficient in form, and if well founded, is fatal, whether ited in by its co-appellant or not, for as we shall see, e authorities hold that it is the duty of the court, of its n motion, to dismiss a multifarious bill, although not jected to on that ground by the parties defendant.

We have gone very far in sustaining bills where this arge has been made, but in the present case we are con- rained to the conclusion that we must either hold the ll to be multifarious, or declare that this ground of de- urrer can no longer be availed of in this jurisdiction.

In *Seefried* v. *Clarke,* 113 Va. 365, 74 S. E. 204, the ost recent expression of opinion by this court upon this bject, it was held, that in a bill for partition "the courts ay set aside a deed to one of the parties of a part of the nd to be divided, either because the grantor had no power make the deed, or because of his mental incapacity; and at the fact that both grounds for setting aside the deed e alleged in the bill for partition does not render the bill ultifarious. Such a bill attains the desired end in a way nvenient to all concerned, and does no serious injury to y one of them." A number of cases decided by this urt are there considered, and the question of convenience as carried as far as we deem it proper to extend it.

In *Dunn* v. *Dunn,* 26 Gratt. (67 Va.) 295, section 271 of ory's Eq. Pleading is quoted and approved as follows: A bill should not be what is technically termed multi- rious; for if it is so, it is demurrable, and may be dis- ssed by the court of its own accord, even if not ob- cted to by the defendant. By multifariousness in a bill is eant, the improperly joining in one bill distinct and in- pendent matters, and thereby confounding them; as, for

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example, the uniting in one bill of several matters pe
distinct and unconnected againt one defendant, or
mand of several matters of a distinct and indep
nature against several defendants, in the same bi
the latter case, the proceeding would be oppressive, b
it would tend to load each defendant with an unnec
burden of costs, by swelling the pleadings with the
ment of the several claims of the other defendants
which he has no connection."

This statement of the law is peculiarly apposite
case under consideration, for the very evil which th
tation points out is well illustrated by the magnit
the record before us. The claims of the Ritter L
Company and of W. L. Dennis are wholly separat
distinct. They have no sort of connection the one wi
other. The case against each is sufficiently stated
bill to entitle the plaintiff to relief if established by

In *Washington City Savings Bank* v. *Thornton,*
157, 2 S. E. 193, it is said to be impossible to lay dow
rule applicable to all cases, as to what constitutes
fariousness. "It is well settled, however, that a bill
murrable in which are united several distinct rights
sufficient, as stated, to sustain a bill against one defe
or in which there is a demand of several matters, disti
their nature, against several defendants, who are
nected in interest and liability."

The decisions of this court bearing upon the subje
fully collated in *Seefried* v. *Clarke, supra,* and no f
citation of authority is deemed necessary.

The decree of the circuit court must, for the re
stated, be reversed; and this court will render such
as the circuit court should have entered.

Revers

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Richmond

DEVERS V. DEVERS.

November 20, 1913.

DIVORCE—*Desertion—Case in Judgment.*—The husband, in the case in judgment, is not entitled to a divorce from his wife on the ground of desertion. He seems never to have made any provision for a home for her nor to have taken care of her, and when she left him they parted as friends, and she went with his consent. Since their separation he has made no effort to get her to return, and has not answered her letters. It is his duty now to provide a home, however humble, for their habitation, and to invite her to return to her duty and share it with him. The well-being and good order of society demand that husbands and wives shall in good faith endeavor to reconcile their differences, and dwell together in unity and peace rather than to make occasion for resort to the courts for redress.

Appeal from a decree of the Circuit Court of Rockingm county refusing to grant the complainant a divorce.

Affirmed.

The opinion states the case.

Charles A. Hammer, for the appellant.

No Counsel for the appellee.

WHITTLE, J., delivered the opinion of the court.

This case is satisfactorily discussed in the opinion of his nor, the judge of the circuit court, as follows:

'The parties are both natives of this county. They were rried at Atlanta, in New York State, the home of the

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defendant at that time, on July 22, 1906. After
were married they lived at Newport News, Va., for a
then at Cincinnati for a while, then returned to Ten
gion, in this county, where both had formerly
Whether the parties were ever domiciled together
their return to Tenth Legion does not appear fro
evidence. The plaintiff lived with his mother, and th
for a couple of weeks before she went away was wi
aunt. Whether a home was provided for the wife
home of her mother-in-law or elsewhere has not bee
in evidence. At the time the desertion by the wife
leged to have taken place, the plaintiff testifies hi
came over to his mother's home, from her aunt's whe
was then staying, and asked the plaintiff to help
pack her trunk, whereupon he asked her, 'Where a
going?' to which she replied, 'I am going home.' A
witness testified this is all she said, and he asked
more questions, and nothing more was said at the t

"The witness testified that he and his wife were
in Cincinnati when the plaintiff decided that on acco
the state of his mother's health he would have to
to his old home to care for her. His wife objected
course, but he overruled her objections and persuad
to come along with him, promising her that if she
wait until April he would send her home. He sa
gave him no rest from the time he got home until sh
and that when he got back he did not have the mo
send her home, and that she left before he could sup
sending to her home for the money. All of this look
much like the plaintiff consented to his wife's going
old home, whether because of her insistence or beca
was not able to settle her in a home, or from th
causes combined, or from some other cause, makes
ference. The further conduct of the parties is to th
effect. The testimony of the plaintiff shows that hi

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wrote to him on her arrival at her old home in New York, and he says he answered the letter. He also says he got other letters which he did not answer, the last one being received in October, 1908, nearly a year after she left. These letters were not put in evidence. The plaintiff says that they were friendly. He also says he and his wife parted friends. He also says he never asked his wife to return to him. It is true the plaintiff testifies that either before they left Cincinnati or elsewhere, perhaps by letter (he doesn't specify), his wife said she would never live with him at Tenth Legion, but it does not at all appear that she meant to separate herself permanently from her husband or even contemplated that result as the probable consequence of her conduct. It seems pretty plain that the husband consented to her going. He has not only not sought to have her return, but he discouraged and broke off the correspondence which she tried to keep up with him by letter, even to the extent of writing to him several letters that he never answered, and he seems never, either before or after her departure, to have made any provision to house her or take care of her."

It is clear from appellant's own version of the matter, as given in his deposition, that the circumstances attending his wife's departure from Virginia did not amount to wilful desertion or abandonment of her husband. He had agreed that if she would defer her visit to her parents in the State of New York until the following April, he would pay her traveling expenses. With this promise he failed to comply, alleging by way of excuse that he did not have the money. She afterward obtained the necessary means from her own people, and, with the knowledge of her husband who was present and assisted in packing her trunk, and who interposed no objection whatever to her going, left for the home of her parents. Appellant also testified that their parting was friendly. Continuing, he says:

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"She wrote me when she got home, and I answered letter. I got something like two or three letters from The same as I would get from one of my relatives." he admits that without cause he discontinued the c spondence and never wrote to her again. In answ the question, why he made no effort to induce his wi return to Virginia and live with him, he replied: "I di think it was any use, and the way she left me I was like you would have been or any one else, a little too s to ask her." This was his attitude toward his wife, w only offense was that, with his consent, she had gon a visit to her parents. He ignored her friendly let and was too proud to admit that he wished her to ret but he was not ashamed to use her absence, brought a in part at least by his own misconduct, as an excus a suit for divorce on the ground of wilful desertion.

Under the circumstances detailed it was, and still is duty of appellant earnestly to endeavor to bring abo reconciliation with his wife, to prepare a home, how humble, for their habitation, and to invite her to retu her duty and share it with him. The well-being and order of society demand that husbands and wives sha good faith endeavor to reconcile their differences and together in unity and peace, rather than to make occ for resort to the courts for redress. It is against p policy to encourage such litigation, and it is not the ince of a court to grant relief to a plaintiff whose conduct has contributed to bring about, if indeed he di connive at, the condition of which he complains.

The decree of the circuit court is without error and be affirmed.

Affirm

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Richmond

DICKENSON AND OTHERS v. RAMSEY AND OTHERS.

November 20, 1913.

Absent, Whittle, J.

EQUITY—*Jurisdiction—Lost Instrument—Fraudulent Alteration—Proof Required—Case in Judgment.*—While courts of equity have jurisdiction to set up lost deeds and wills and to establish titles under them, the proof of the former existence, the loss and the contents of the instrument, should be strong and conclusive before the courts will establish a title by parol testimony to property which the law requires shall pass only by deed or will. The same principle applies to an alleged alteration of a deed which would amount to a forgery. The law never presumes fraud, and it must always be clearly alleged and proved. The testimony in the case in judgment falls far short of the degree of proof which the law requires.

Appeal from a decree of the Circuit Court of Russell unty. Decree for the complainants. Defendants appeal.

Reversed.

The opinion states the case.

Routh & Routh, Vicars & Peery and *R. S. Graham,* for e appellants.

W. W. Bird, for the appellees.

KEITH, P., delivered the opinion of the court.

The bill in this case is filed by the children of Eliza msey, and in it they set out the following case: That

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Polly Ramsey, their grandmother, by deed dated J
1884, conveyed to their mother, during her life, and
death to themselves as her children, in fee, a tract
containing one hundred and fifty acres, in Russell
with reservation of a life estate to the grantor, and
ing also a life estate to William Ramsey, the fa
complainants; that the purpose of the said deed wa
the reservation of a life estate in Polly Ramsey, to
the said tract of land to their mother for life, wit
estate to their father in case he should survive their
and then to complainants, as the children of Eliza R
in fee simple absolute; that what purports to be th
is of record in the clerk's office of Russell county,
copy of it is exhibited as a part of the bill. Th
plainants charge, however, that this is not a true
of the deed as executed by their grandmother, Poll
sey, as this deed contains no reference to themselves
children of Eliza Ramsey; that portion of the deed
been fraudulently blotted out after the death of their
mother and before the deed was admitted to record
bill alleges that the deed was altered by striking or b
out of it so much as referred to the children of Eliz
sey and passed to them the fee simple estate in the
remainder, and that the fraud was perpetrated
purpose of enabling their father and mother to co
fee simple in the land to the purchasers thereof. T
further charges that after the deed had been altered
father and mother conveyed the land in dispute to
persons, and these grantees and their alienees are
parties defendant.

The answers of the defendants deny every mater
legation in the bill, and upon the issues thus made
witnesses were examined, the case was heard and
cree rendered in accordance with the prayer of th

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and is before us for review upon an appeal awarded by one of the judges of this court.

The law applicable to such cases has been recently and frequently the subject of consideration by this court.

In *Thomas* v. *Ribble,* 2 Va. Dec. 321, 24 S. E. 241, this court said: "Where the instrument rises to the dignity and importance of a muniment of title, every principle of public policy demands that the proof of its former existence, its loss and its contents, should be strong and conclusive, before the courts will establish a title by parol testimony to property which the law requires shall pass only by deed or will. That courts of equity have the jurisdiction to set up lost deeds and wills, and establish titles under them, can certainly not be denied; but it is a dangerous jurisdiction, and so pregnant with opportunities of fraud and injustice that it will not be lightly exercised nor except upon the clearest and most stringent proof. . . . It is the policy of the law, adopted with a view to prevent frauds, that title to lands shall pass only by written instruments; and the difference is more in name than in fact between giving effect to a parol conveyance of lands and establishing a title to lands under an alleged lost deed, upon parol testimony of its contents and loss, unless the proof be clear and conclusive. Certainly the opportunities for fraud are just as great in the one case as in the other." See also *Barley* v. *Byrd,* 95 Va. 316, 28 S. E. 329.

Thomas v. *Ribble* has been cited with approval by this court in numerous cases, the most recent of which is that of *McLin* v. *Richmond,* 114 Va. 244, 76 S. E. 301.

The case before us is not that of a lost deed, but the charge is that the deed as originally executed has been so despoiled, mutilated and changed since its execution by the grantor as to amount to a forgery.

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It is a fundamental principle of law that fraud m
clearly alleged and proven. Every presumption is in
of innocence and not of guilt. *Engleby* v. *Harvey,*
445, 25 S. E. 225; *Shoemaker* v. *Chapman Drug C*
Va. 612, 72 S. E. 121; *Johnson* v. *Lucas,* 103 Va. 36,
E. 497. But the citation of authority for so elemen
proposition is wholly superfluous.

To the same effect is the law as to lost instrument
every consideration of policy which influences the co
require clear and convincing proof in such cases a
with full force to the case before us.

There is no question as to the jurisdiction of the
to grant the relief prayed for by plaintiffs, but the
must be clear, cogent and convincing.

A careful examination of the testimony in this case
fies us that it falls far short of the degree of proof
the law requires. There is no occasion to impugn th
cerity and veracity of the witnesses. They are ign
people speaking of transactions which occurred more
twenty-five years ago. One of the principal witnesses
Kiser, testified in chief that she had seen the original
of which that filed with the bill purports to be a co
her father's house, with whom it had been left for
keeping, and that the original deed was "to Eliza Ra
and to her children, and to William Ramsey for a life
estate." Upon cross-examination she says, in answ
the question, "Do you know or not whether the dee
saw is the one in controversy?" "I do not know it,
believe it from what people say." Q. "You do not kn
I understand you, whether the deed you saw at your
er's house is the one in controversy?" A. "No, sir, I d
know, but it appears to me that it must be that
And again: "You do not undertake to say that the dee
saw was the same as the deed in controversy to-day?
"I do not. I do not know it, but I believe it awful str

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. "How do you happen to believe it so awful strong?" A. From what people say. Bill said it."

Another witness for the plaintiffs, Joseph Fraley, testi-es that after Polly Ramsey's death, when negotiations ere going on for a sale of a part of this land to one Hens-ll, he heard the contents of this deed discussed, and that ensdill was told by William Dickenson, with whom he dvised with respect to the title, to take the deed back to arnett, by whom it had been written, "and have it doc-red on," for if he should buy it "them heirs would give m trouble, and that the deed was doctored and returned Hensdill and Dickenson, and then Hensdill bought it." arnett utterly denies that the deed was ever brought to m for such a purpose, and it is only adverted to as throw-g light upon the general character of the testimony re-ed on. The testimony of both Barnett and Amburgey is ry vague and indefinite, though they both say that by the ed as written Eliza Ramsey was to have a life estate and her decease then to her children.

If we turn to the deed as recorded, it will be seen that ter a lapse of twenty-seven years witnesses, however nest and intelligent (and these witnesses, however hon-t, were certainly not intelligent) might well be confused d mistaken with respect to its phraseology. The first ause of the deed recites that Polly Ramsey in considera-on of the natural love and affection she has for her daugh-r, Eliza, doth grant, with general warranty, unto her a rtain tract of land. The second clause describes the land nveyed, and then follows: "Yet upon the following con-itions, to-wit: The said Polly Ramsey first reserves to her-lf a life interest in the above subscribed lands during her atural life, then the aforesaid lands go to Eliza Ramsey nd her husband William Ramsey a life estate and full con-rol of thereof in the land described above thereof, with all he appurtenances, forever." It may be that it was the in-

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tention of the grantor that Eliza Ramsey and her hu
should take only a life estate, and that the scrivener
properly to express that intention; but that is not th
made by the pleadings, nor does the evidence suppo
and still less does it maintain the theory of spoliatio
forgery with that certainty which the law demands.

For these reasons we are of opinion that the decree
circuit court should be reversed.

Rever

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Richmond

ENERAL BOARD OF STATE HOSPITALS FOR THE INSANE v. ROBERTSON, COMMITTEE OF ROWE.

November 20, 1913.

TRUSTS AND TRUSTEES—*Interest in Trust Subject—Insane Persons—Suit by Committee.*—The right of maintenance, either entire or partial, in a trust fund constitutes such a proprietary right in the fund as entitles the beneficiary to the protection of the courts with respect to it, and where this right is vested in an insane person, his committee is the proper person to sue for its preservation and protection. Code, section 1697.

INSANE PERSONS—*State Hospitals—Trustee for Beneficiaries.*—A State hospital for the insane in this State is suable in its private capacity, and where it has seen fit to accept a trust, it stands on the same footing with respect to it as any other trustee. The legislature may prohibit it from accepting the trust, but, when once accepted, the trust subject must be applied to the purpose to which it has been dedicated by the grantor.

CONSTITUTIONAL LAW—*Particular Trust—Diversion by Legislature.*—Private property donated by a testator to a well-defined valid trust cannot be diverted by the legislature to a distinctly different object. The legislature has no power to seize upon private property thus dedicated and appropriate it to a wholly different purpose, however meritorius such purpose may be, and legislation to that effect is unconstitutional and void. If the trust declared by the will is lawful, the beneficiaries have property rights in the trust subject which cannot be taken away from them by the legislature. If the trust is unlawful, the property belongs to the heirs of the testator, and is equally under the protection of the law.

PARTIES—*Suit to Test Validity of Donation by Will—Heirs of Testator.*—Where a will has long since been admitted to probate and its validity is not questioned, the heirs of the testator are *not necessary* parties to a suit to test the valadity of a donation made by the will.

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5. COSTS—*Public Officers.*—Costs ought not to be awarded ag
fendants to a suit who are public officers of the State,
no personal interest in the litigation, and were repres
and acted under the advice of the Attorney General.

Appeal from a decree of the Circuit Court of
county. Decree for the complainant. Defendants

Amended and Affir

The facts leading up to this litigation are these
will of Sidney R. Murkland, which was duly admi
probate in the circuit court of Amherst county, Vi
after providing for the payment of funeral expens
debts, gives "to 'Trustees State Hospital, Staunto
where my son Sidney Price Murkland is now car
the entire balance of my property, real and person
income from which to be used by said trustees fo
chase extra comforts patients said Hospital for all

Testator's estate consisted of a small amount
sonal property and some real estate in the city of
burg, and a farm containing one hundred and fif
acres situated in Amherst county. The Western
Hospital, having accepted the trust, brought suit
corporation court for the city of Lynchburg again
administrator with the will annexed, the other benef
under the will, and creditors, to administer the
The Amherst county property was sold by a decree
court to the Western State Hospital for $17,025, of
sum the hospital paid to the court's commissioner
the amount necessary to discharge the unpaid indebt
of the estate and costs and expenses of litigation.
court in confirming the sale decreed that the balance
purchase money "is under the will of S. R. Murklan
ceased, the property of the said Western State Hos

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d therefore directed a conveyance of the land to be made the hospital, which was accordingly done.

By an act of the General Assembly, approved February , 1906, (Acts 1906, p. 36) the special board of directors the Western State Hospital were authorized and di-cted, under the supervision and control of the general ard of directors of the State hospitals of Virginia for e insane (hereinafter called the general board), to erect the Murkland land" suitable buildings, etc., for the es-blishment of a colony for the reception, care, treatment, aining and employment of three hundred epileptic pa-nts. No action was taken under the foregoing act, and at e next session the General Assembly passed another act, proved March 12, 1908 (Acts 1908, p. 295), which pro-ded that if in the opinion of the general board it should pear proper the Western State Hospital should sell and nvey the whole or any part of the "Murkland land," and th the proceeds purchase other lands in Amherst county r the purposes of said epileptic colony. Thereupon the neral board directed the Western State Hospital to ake sale of the "Murkland land" for the purposes afore-id.

The Western State Hospital then filed its bill in the rcuit court of the city of Richmond against the general ard, reciting the foregoing facts and charging that the Murkland land" in its hands was impressed with a trust favor of the inmates of the Western State Hospital, as clared by the will of Sidney R. Murkland, deceased, der which to the extent of $14,000 the land was ac-ired, that the trusts declared in the will were clear, defi-te and legal, and that complainant was competent to ecute the trusts, etc. The object of that suit was to de-rmine the question of the power of the General Assembly enact the foregoing statutes authorizing the general ard to divert the trust property from the purposes to

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which it, or its proceeds, had been dedicated by the
tor's will.

The general board demurred to the bill upon the
that the suit was in effect a suit against the State,
suit by one branch or arm of the State government
another branch or arm of the State government, and
fore that the circuit court of the city of Richmo
without jurisdiction to hear and determine the case
circuit court sustained the demurrer and dismissed t
and its decree was affirmed on appeal to this court.
ern State Hospital v. *General Board of State Ho*
for the Insane, 112 Va. 230, 70 S. E. 585.

Caskie & Caskie and *Samuel W. Williams, At*
General, for the appellants.

Timberlake & Nelson, for the appellee.

WHITTLE, J. (after making the foregoing state
delivered the opinion of the court.

The present suit was instituted by the appellee, A.
Robertson, committee of Joseph S. Rowe, an insane p
against the Western State Hospital, trustee under t
of Sidney R. Murkland, deceased, the general boa
the individual members thereof. The bill allege
Joseph S. Rowe had been adjudged a lunatic in the
of Augusta, the place of his residence, and had bee
mitted to the Western State Hospital for care, maint
and treatment, and still is an inmate of that asylu
that he is one of the beneficiaries of the trust crea
the Murkland will, and has such property interest
trust subject as to entitle his committee to invo
jurisdiction of a court of equity to establish the tru
protect the trust property from the misappropr

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sought to be made of it by the general board under the authority of the acts of the General Assembly above mentioned; that said acts are not only in contravention of the State Constitution, but are also violative of the Fourteenth Amendment of the Constitution of the United States, in that they deprive the lunatic of property rights without due process of law, and deny to him the equal protection of the law; and that the proposed diversion is tantamount to taking private property for public use without just compensation. The bill prays that the will be construed and that its true meaning and intent be declared; that the land conveyed by the commissioner of the corporation court of Lynchburg to the Western State Hospital be held to be impressed with the trust declared by the Murkland will in favor of the lunatic Joseph S. Rowe, and other inmates of the asylum similarly situated; that the Western State Hospital as trustee be required to administer the trust in accordance with the provisions of the will; and that the general board be declared to be without lawful authority to direct any disposition of the land in conflict with the disposition thereof made by the testator in his will.

The general board and the Western State Hospital demurred to the bill, and appealed from two decrees of the circuit court of Augusta county—one overruling the demurrer (but giving the defendants leave to answer the bill), and the other granting the relief prayed for.

Several grounds of demurrer are assigned, but as interpreted by appellants in their position for appeal, they practically resolve themselves into two propositions, namely: (1) That the committee has no authority to maintain the suit, because the estate of the lunatic is not involved; and (2) that this is "a suit against a public corporation or board, created and existing for purely governmental purposes, and as mere agencies of the State, composed exclusively of persons who have no personal interest in the

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subject matter, and are only acting as an arm of the
monwealth, whatever its form, is in effect a suit ag
the State."

1. The statute provides for the appointment of a
mittee for a person found to be insane (Code, sec. 1
and declares that such committee "shall be entitled t
custody and control of his person (when he resides i
State, and is not confined in a hospital or jail), shall
possession of his estate, and may sue and be sued in re
thereto. . . He shall take care of and preserve su
tate and manage it to the best advantage . ."
1702).

In *Bird's Committee* v. *Bird,* 21 Gratt. (62 Va.)
it was held that every suit respecting the person or
of the lunatic must be in the name of the committee, u
his interests are adverse to the lunatic, in which c
shall be brought in the name of the lunatic by his
friend approved by the court.

We need hardly stop to discuss the proposition tha
right of maintenance, either entire or partial, in a
fund constitutes such a proprietary right in the fu
entitles the beneficiary to the protection of the courts
respect to it. The contrary doctrine would outlaw a
tlements made for support and maintenance and le
untold mischief.

2. The vice in the second ground of demurrer is t
fails to distinguish between a suit against the We
State Hospital in its public governmental capacity
a suit against it in its private capacity as trustee u
the Murkland will. In the former character a suit ag
it would be a suit against the State, and such suit ca
be maintained by an individual unless the State ch
to waive its immunity and submit itself to the jurisdi
of the courts. On the other hand, that the Western
Hospital, in its private capacity, is suable is equally p

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In this instance it has seen fit to accept the trust, and stands upon the same footing with respect to it as any other trustee. *Vidal* v. *Girard,* 2 How. 128, 11 L. Ed. 205; *Barnum* v. *City of Baltimore,* 62 Md. 293, 50 Am. Rep. 219; *Regents* v. *Detroit Young Men's Society,* 12 Mich. 161; *Philadelphia* v. *Fox,* 64 Pa. St. 181.

The foregoing distinction has been repeatedly recognized by the decisions of this court. Thus, in *Dunningtons* v. *President and Directors of the Northwestern Turnpike Road,* 6 Gratt. (47 Va.) 160, it was held that the defendant, a public corporation, was liable to be sued for work and labor performed and materials furnished for the corporation by the plaintiff.

So also, in *Eastern Lunatic Asylum* v. *Garrett,* 27 Gratt. (68 Va.) 163, an action of trover was maintained against the asylum for food supplies taken from the plaintiff during the civil war by the United States forces and sent to the asylum and used for the support of the inmates. And in *Blanton, Com.,* v. *Southern Fertilizing Co.,* 77 Va. 335, the same principle was maintained. See also *Osborne* v. *Bank of United States,* 9 Wheat. 816, 6 L. Ed. 204; *Davis* v. *Gray,* 16 Wall. 220, 21 L. Ed. 447; *Board of Liquidation* v. *McComb,* 92 U. S. 531, 23 L. Ed. 623.

In *Maia's Admr.* v. *Eastern State Hospital,* 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577, it was held that the asylum was not liable in damages for personal injuries inflicted on one of the inmates by the negligence of persons administering the powers of the corporation. But in that case the decision in *Eastern Lunatic Asylum* v. *Garrett, supra,* is expressly approved.

Appellants claim much wider scope for the decision in *Western State Hospital* against *The General Board* than is warranted by the opinion. In that case the court merely held that the circuit court of the city of Richmond possessed only such equity jurisdiction as is conferred upon

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it by statute, and rested the decision on the ground t
it was without jurisdiction to entertain the suit in the p
ticular case, the parties to the record both being pul
corporations created for governmental purposes.

We deem it unnecessary to prolong this opinion b
more extended review of the authorities. With rare
ceptions they recognize the obvious distinction betw
the control which the legislature may exercise over pr
erty held by a public corporation for public purposes, a
of property held by such corporations as trustee un
private grant, with restrictions and trust limitations
posed by the grant. In the former case the power of
legislature over the property is supreme; in the latte
may prohibit the public corporation from accepting
trust, but, when once accepted, the trust subject n
be applied to the purposes to which it has been dedica
by the grantor.

On the merits of the case we entertain no doubt t
the two acts of the General Assembly authorizing
general board to divert to a distinctly different ob
private property donated by the Murkland will to a
defined, valid trust are wholly unconstitutional and v
The subject matter of the trust was the absolute prop
of the testator, who saw fit, through the medium
trustee of his own selection, to appropriate the inc
arising therefrom to a designated class of unfortunate
sons, and not to the public. In these circumstance
would indeed be a dangerous doctrine to hold that
General Assembly has power to seize upon private p
erty thus dedicated and appropriate it to a wholly diffe
purpose, however meritorious such purpose may be.
the trust declared by the Murkland will is lawful,
beneficiaries have property rights in the trust sub
which cannot be taken away from them by the legislat
If, on the contrary, the trust is unlawful, the property

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ongs to the heirs at law of Sidney R. Murkland, deceased, nd is equally under the protection of the law; so that in o aspect of the case can the contention of appellants revail.

The Attorney-General for the first time in his closing rgument raised the question that the decree should be eversed because the heirs at law were not made parties. t would have been better practice had this objection been ade at the beginning of the litigation rather than at the lose, but the objection is without merit. The will has ong since been duly admitted to probate, and its validity not questioned, and the contentions of both litigants est upon the validity of the donation. In such case the eirs at law of the testator are not *necessary parties.*

The last assignment of error goes to that part of the ecree which awards costs against the defendants. Apel-nts are public officers of the State, and have no personal nterest in the litigation, and were represented by and cted under the advice of the Attorney-General. We are opinion that costs ought not to have been awarded gainst them. To that extent, therefore, the decree of ctober 28, 1911, will be amended, and with that amend-ent the two decrees appealed from must be affirmed.

Amended and Affirmed.

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Richmond

GENT'S EXECUTRIX v. PRUNER'S ADMINISTRAT

November 20, 1913.

Absent, Buchanan and Whittle, JJ.

1. HUSBAND AND WIFE—*Wife's Land—Judgment Against H Case in Judgment.*—The evidence in the case in judgm that no part of the purchase money for a house and to be subjected to the lien of a judgment against was paid by him. He was never in a condition to p the contrary, the purchase was negotiated by the wif sideration was furnished by her, she was the repu of the property, and, when sold to another, before acquired the legal title, the sale was negotiated by husband had no interest in the property, and it is to the lien of a judgment obtained against him.

Appeal from a decree of the Circuit Court of county. Decree for the defendants. Complainant

Aff

The opinion states the case.

S. B. Quillen and *H. A. Routh,* for the appellan

W. W. Bird, for the appellee.

KEITH, P., delivered the opinion of the court.

J. C. Gent, at the March term, 1887, of Russel court, recovered a judgment against George A. for $125, with interest from the 20th day of Apr until paid. This judgment was docketed and

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kept alive by the issuance of executions, and at the second November rules of the circuit court of Russell county a bill was filed to subject to its payment a tract of land which, it is alleged, Pruner owned after the judgment was obtained against him.

This land had been sold during Pruner's lifetime to one J. P. Speer, and a deed was made for it, in which Fields and wife, from whom the land had been purchased, united with George A. Pruner and his wife so as to convey Speer a complete title. Speer sold the land to Hensdill, and the bill makes the representatives and heirs of George A. Pruner, deceased, J. P. Speer, W. A. Fields, J. D. Hensdill, and Virginia Pruner, the widow of George A. Pruner, parties defendant. None of the parties answered except Speer, Fields and Hensdill. They deny that Pruner purchased from Fields, or anyone else, the tract of land in the bill mentioned, but aver that the property was purchased by Mrs. Pruner, the wife of George A. Pruner, who paid the purchase money out of her own separate estate, and that George A. Pruner had no money with which to buy this or any other tract of land; and they claim that Mrs. Jennie Pruner was the sole purchaser of the property from W. A. Fields.

The facts seem to be as follows: Mrs. Virginia Pruner negotiated with Fields, who was the original owner of the house and lot in dispute, for its purchase. The bargain was made with her and the money in large part paid by her. Her husband was in very narrow circumstances, and the strong tendency of the evidence is to show that he never had the means to make and did not make payment for the land. As we have said, the negotiation for the purchase from Fields was made by Mrs. Pruner; the purchase price was $825; she was unable to pay the whole of it, and called upon Joseph A. Pruner, the son of George Pruner by a former marriage, to aid her in the matter,

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which he did, and the whole purchase price was pa
Fields, but for some cause a deed was not promptly
to the purchasers by him. After a time the propert
sold by Mrs. Pruner to J. P. Speer for the price of $
who paid for it by two checks on the Citizens Na
Bank, Lebanon, Va., both of which are dated Nov
21, 1906, one payable to J. A. Pruner for $800 an
other to Jennie Pruner for $700. This distribution
purchase money between Joseph A. Pruner and J
Pruner was in accordance with her direction. She
the sale to J. P. Speer and she apportioned the pu
money between Joseph A. Pruner, her stepson, and h
and Speers gave his checks in accordance with her
tion. As far as we can gather from the facts, this
just and proper settlement of the transaction by
Joseph A. Pruner was reimbursed for the advanc
he had made, and Mrs. Pruner received that whic
had paid. When the deed came to be made, the titl
being in W. A. Fields, who had been fully satisfied
payment to him of the price at which he had sold th
to Mrs. Pruner, he and his wife united in the deed to
in order to give him a complete title.

There is no satisfactory evidence that we have bee
to discover of any money passing from George A. P
to his wife, or to W. A. Fields, or to anyone else. H
a very old man, was a saddler and harness-maker by
and, so far as this record shows, never had any mo
advance of necessities of life which he could have a
to the purchase of this property. The only evidence
having any money at all is that prior to his marri
Virginia Pruner, which occurred when both he an
were well stricken in years, he sometimes gave t
trifling sums of money, the amount of which is no
stated. We have been unable to fasten upon anyth
the record which shows that he ever made any suc

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nent upon the land, or ever had any such interest in it s could be bound by the lien of the judgment against im. On the other hand, the strong preponderance of roof is that Mrs. Pruner bought the land in her own ame; that she paid for it in part; that the residue of the urchase price was paid by her stepson, Joseph A. Pruner; nat she negotiated the sale to J. P. Speer; that she was t that time regarded as the owner of the property, and nat when sold the purchase price was properly divided etween Joseph A. Pruner and herself, in accordance with neir respective equities.

So that, upon the whole case, we are of opinion that the ecree of the circuit court is right and should be affirmed.

Affirmed.

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Richmond

GOODLOE v. WOODS.

November 20, 1913.

1. WILLS—*Reversion—Power of Disposition—Deed or Will.*—devise of land to several parties for their lives a disposed of by them at their deaths as they may thin the quoted words are not sufficient to limit the exerc power of disposition to a disposition by will. Where power of disposition over the reversion is given t tenant of real estate, it may be exercised by a deed and delivered during his lifetime.
2. JUDGMENTS—*Collateral Attack.*—The decree of a court of jurisdiction, with all of the parties before it, settling of parties, their estates under a will, and the powe parties over such estates, cannot be collaterally assai
3. CONTRACTS—*Rights of Third Persons—Marriage Settleme* a marriage settlement by a husband upon his wife, th has failed to convey to his wife as large an estate i as, before marriage, he had contracted to convey to h conveyed the property to a trustee for the benefit o and the children to be born of the marriage instead wife only, these are not matters of which subsequent p from the wife can complain.
4. ESTATES—*Fee-Simple—Gift to Wife and Children—Deeds* A gift to a wife and children, without more, vests a j in the wife and children in equal portions. The lan the mother and her children," standing alone, does no fee simple in the mother. The mother is given a fee-s when it appears from the context, or from the whole i taken together, that such was the intention of the te of the grantor, if the gift was by deed.
5. JUDICIAL SALES—*Rights of Purchaser.*—A purchaser at sale takes only the rights or interest of the parties court, and persons not before the court are not bou way by the proceedings.
6. PARTIES—*Representation.*—The doctrine of representati only to contingent interests, and, further, in order to parties not before the court, the party before the c

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be one of a class whose interests are identical with the parties to be represented.

7. JOINT OWNERS—*Purchase of Title by One.*—A co-owner of property cannot purchase an outstanding title except for the common benefit. If such owner pays off an encumbrance on the property and takes a deed to himself, he holds the title for all the co-owners, but is entitled to credit for such payment in any settlement thereafter made with them.

8. TENANTS IN COMMON—*Deed by One—Effect.*—A deed from a tenant in common carries to the grantee only an undivided interest in the property, no matter by what description the property is conveyed.

9. VENDOR AND PURCHASER—*Defective Title—Rights and Liabilities of Vendee.*—If a vendor is unable to convey good title to a purchaser who has been put in possession of land, the purchaser should be given the privilege of accepting such title as the vendor can make; but, if he refuses to avail himself of the privilege, a court of equity will decree the surrender of the land to the vendor.

0. APPEAL AND ERROR—*Amount in Controversy—Interlocutory Decree.* A decree fixing upon a party liability for rents is interlocutory until the amount of the rent is ascertained. The amount may not be sufficient to give this court jurisdiction.

1. VENDOR AND PURCHASER—*Defective Title—Surrender of Possession—Rents—Improvements.*—Where real estate is sold and the vendor cannot give a good title, but puts the vendee in possession, who makes improvements thereon, if an accounting is taken, the rents and profits up to the time of the decree for the surrender of the property should be set off against the improvements. The vendee is chargeable with reasonable rents and profits, and with any waste committed by him.

2. COSTS.—Costs in trial courts are in the discretion of those courts and their action will not be reversed, except upon a clear showing of abuse.

Appeal from a decree of the Circuit Court of Nelson ounty. Decree for the complainants. Defendants appeal.

Affirmed.

The opinion states the case.

Coleman, Easley & Coleman, for the appellants.

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Caskie & Caskie and *S. B. Whitehead,* for the ap

HARRISON, J., delivered the opinion of the cour

On June 5, 1909, Sallie E. Woods and Samuel F. her husband, entered into a contract with W. G. whereby they undertook to sell him a tract of Nelson county, containing one hundred and s acres, at the price of $1,150. Of this sum the pu paid twenty-five dollars in cash, undertook to have deed of conveyance prepared, took possession of t and afterwards transferred the benefits of the con one E. L. Mathews, and delivered to him the pos Neither Goodloe nor Mathews ever paid anything purchase except the $25.00 mentioned, and on the August, 1910, more than a year after the contr made, Goodloe wrote to Mrs. Woods, the vendor, th was trouble about the title, and that nothing would on account of the purchase until the title was cle

To the following April rules (1911) the appell the bill in this case, in which they set out the fa tioned, and allege, among other things, that they vised that the land in question belonged equally to pellee, Sallie E. Woods, and her two children; tha was true the parties were powerless to convey the of the children, and that it would be inequitable the appellants to retain the land and refuse to part of the purchase money. The prayer of the that the contract might be specifically executed, if chasers were willing or could be required to ta title as Woods and wife could give, or that the be rescinded and complainants restored to the po of the land, and that the defendants be required to for a fair and reasonable rent during the time it h in their possession.

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W. G. Goodloe, E. L. Mathews and the two children of Sallie E. Woods were made parties defendant to this bill, with leave to answer, affirmation to such answers being waived.

Percy L. Woods, one of the children of Sallie E. Woods, (an adult) answered the bill, asserting his rights in the land, insisting that he has done nothing to impair such rights, and objecting to any action that would interfere with his ownership, or any right he may have in the land. Ruth Woods, the other of the two children, is an infant and answered by guardian *ad litem,* asking that her rights be protected.

The defendants, Goodloe and Mathews file separate answers in which each of them denies that the two children of Sallie E. Woods have any interest in the land, and insist that Samuel E. Woods and wife should be required to specifically execute their contract by making a clear title thereto.

The circuit court held that the children of Sallie E. Woods were jointly interested with her in the land; that the title was not such as the purchasers should be required to take, and allowed them to elect whether they would take such title as their vendors could give, and if not that the parties should be restored to their former rights. The purchasers declining to accept such title as they were held to be entitled to under their contract, the court directed that the possession of the land should be restored to Sallie E. Woods and her two children, and referred the cause to a commissioner to take an account of rents, improvements, etc. From this decree the defendants, Goodloe and Mathews, have taken this appeal.

Whether or not the decree complained of is right depends upon the correctness of its conclusion that the children of Sallie E. Woods have a vested interest jointly with her in the land in controversy. The record shows that in 1869

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James Woods, of Nelson county, died, leaving a will, fifth clause of which he devised certain lands to ten pe of whom Samuel F. Woods was one, during their r tive lives, and to be disposed of by them at their dea they might think proper, and provided for a division lands between the parties. A division of these land had, the tract involved in this controversy being ass to Samuel F. Woods. Soon after the death of James a chancery suit was brought in the circuit court of N county to administer his estate, to which all of his de were made parties. In this proceeding the will of t ceased had to be, and was, construed by decree ther September, 1871, the court holding that the parties tioned in the fifth clause of the will took a joint esta life in the lands, moneys, etc., left them by that clause power of appointment, either by deed or will, to take at their death. So that the proper court, with all prope ties before it, more than forty years ago, adjudicate determined that Samuel F. Woods took a life estate land now in controversy, with a power of appointm take effect at his death, and that this power might b cised either by deed or will. No appeal was ever from that decree.

By contract dated June 5, 1886, Samuel F. Woods to convey his entire interest in the estate of James deceased, to Sallie E. Canady upon the consummat her marriage with him. One week after this contra made, by deed dated June 12, 1886, Samuel F. Woods reciting the contract and the consummation of th riage, in consideration thereof conveyed to I. A. Pau tee, the tract of land in question, upon trust for the u benefit of his wife, Sallie E. Woods, and all childre after to be born of her by the grantor, providing that event of her death without issue the property should to the grantor.

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It is not controverted that Samuel F. Woods took a life tate in the land assigned to him under the will of James Woods, deceased, with a power of appointment as to the remainder, but the appellants contend that whilst the deed Paul, trustee, made in pursuance of the marriage contract, conveyed the life estate, it was unauthorized as to the emainder because the power of appointment could only be xercised by will.

The will of James Woods prescribes no method by which ie power is to be exercised, nor is there anything to indiate that the testator intended that any particular method ould be adopted, unless the language, "to be disposed of them at their deaths as they may think proper," can be onstrued as an intimation that the power is to be exercised will. In our opinion that expression is not sufficient to mit the exercise of the power to a will.

In 22 Am. & Eng. Ency. Law (2nd Ed.), pp. 1107-8, e rule, supported by authorities, is laid down as follows: No special mode is necessary for executing a power unless ere is a provision in regard thereto in the instrument eating the power. In the absence of such provisions e power may be executed by deed, will or other simple riting, sufficient as regards the subject matter. Thus here a general power of disposition over the reversion is ven to the life tenant of real estate, it may be exercised a deed executed and delivered during his lifetime."

In 31 Cyc., p. 1115, it is said: "As a general rule a power ust be executed in strict accordance with its terms, but here no mode is prescribed, or where the manner of exetion is left to the discretion of the donee, he may execute in any manner which will legally effectuate the intention the donor." In support of this text the author cites *night* v. *Yarborough,* 4 Rand. (25 Va.) 566, and *Cowles Brown,* 4 Call (8 Va.) 477.

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In the case last cited the testatrix devised certai
to her husband for life with power at his death t
them among the children of Thos. and John Cowle
husband made the appointments and disposed of the
or some of them, in his lifetime, and this exercise
power was sustained.

The authorities seem to fully sustain in the me
exercising the power reposed in him by the will of
Woods, which was adopted in the case at bar by Sa
Woods. It was, however, unnecessary to consid
question, for the law of this case on that subject was
settled by the decree of September, 1871, alread
tioned, in the case of *Wood* v. *Wood,* which decid
Samuel F. Woods took, under the will of James Wo
ceased, an estate for life with power of appointmen
by deed or will, to take effect at his death. That
settled the question and left no longer any doubt a
interest of Samuel F. Woods in, or his power over, t
in controversy. The validity of that adjudication ha
been questioned until assailed in this collateral pro
forty-two years after the decree was rendered.

Appellants further say that by the terms of the m
contract Samuel F. Woods bound himself to conve
contemplated wife his entire interest in the estate o
Woods, and insist that he did not do so. We fail
preciate the pertinency of this contention in the cas
us. If Samuel F. Woods violated his contract w
wife she could call him to account therefor, but it
constitute no ground for compelling him to exer
power of appointment in favor of the appellants o
of them. Samuel F. Woods had no interest in the l
cept a life estate. He conveyed that life estate by t
to Paul, trustee, and the only complaint that can b
is that he conveyed it to a trustee for his wife a
children of their marriage rather than to her alone.

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the wife acquiesced, and has not only been claiming under the deed ever since it was executed, twenty-six years ago, but has defended it when assailed and had its validity judicially determined.

Appellants contend that if the deed to Paul, trustee, for the benefit of Sallie E. Woods and her children is valid, under its terms the children have no interest in the property and the mother takes the fee simple. In support of this proposition appellants refer to the line of cases of which *Wallace* v. *Dold,* 3 Leigh (30 Va.) 258, was the first.

The law is settled that a gift to a wife and children, without more, vests a joint estate in the wife and children in equal portions. The language "to the mother and her children," standing alone, is not sufficient to create a fee simple in the mother. The mother is given a fee simple only when it appears from the context, or the whole instrument taken together, that such was the intention of the testator. *Fitzpatrick* v. *Fitzpatrick,* 100 Va. 552, 42 S. E. 306, 93 Am. St. Rep. 976. This rule is as applicable in the case of a gift by deed to a mother and her children as it is to such a gift by will.

The language of the deed bearing upon this question is as follows: "Nevertheless, upon trust for the use and benefit of the said Sallie E. Canady, who is now Sallie E. Woods, the wife of Samuel F. Woods, and all children hereafter to be born of the said Sallie E. Woods by her said husband Samuel F. Woods, and should the said Sallie E. Woods die without issue, then and in that event the said property hereby conveyed shall revert to the said Samuel F. Woods."

We find nothing in this language to indicate a purpose to give Sallie E. Woods the entire fee in the property conveyed. On the contrary the reverse quite clearly appears, it being expressly provided that it should go to her and her children, and if she had no children it should, at her death, go back to the said Samuel F. Woods.

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It appears from the record that during the progr
the old suit of *Woods* v. *Woods,* which was brought f
purpose of settling the estate of James Woods, decea
was found necessary to have recourse to the lands d
by James Woods, in order to pay the debts for whi
estate was liable, and the deed from Samuel F. Wo
Paul, trustee, was called in question. The court, in
held the deed to be valid and binding between the p
but void as to the creditors of James Woods, dec
The share of the indebtedness for which the land i
troversy was held liable was fixed at $180.00 and
was ordered and made to satisfy that sum. At tha
Sallie E. Woods became the purchaser of the prope
a price many times more than sufficient to satisfy the
This sum of $180 was afterwards paid by Saillie E. W
and was the only sum paid by her on account of he
chase. Subsequently a deed conveying the land to
E. Woods was made by a commissioner of the court
appellants rely upon this transaction as placing t
simple to the land in Sallie E. Woods. It is concede
the children of Sallie E. Woods were not before the
in the case of *Woods* v. *Woods,* and nothing is bett
tled than that a purchaser at a judicial sale takes on
rights or interest of the parties before the court, an
persons not before the court are not bound in any w
the proceeding.

But it is suggested that their father, Samuel F. W
was before the court and represented his children.
time the sale referred to was made the older of th
children of Sallie E. Woods was an infant of very t
years, and the youngest was not born. These ch
clearly took a vested interest under the deed to
trustee, in the land in dispute. The doctrine of repre
tion applies only to contingent interests, and furth
order to represent parties not before the court, the

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before the court must be one of a class whose interests are identical with the parties to be represented. *Baylor* v. *DeJarnett,* 13 Gratt. (54 Va.) 153-166; *Faulkner* v. *Davis,* 18 Gratt. (59 Va.) 684, 98 Am. Dec. 698; *Harrison* v. *Walton,* 95 Va. 725, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830; *Williamson* v. *Jones,* 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; *Downey* v. *Sieb,* 185 N. Y. 427, 78 N. E 66, 8 L. R. A. 77, and note, 113 Am. St. Rep. 926; *Detrick* v. *Meyatt,* 19 Ill. 146, 68 Am. Dec. 584.

In *Harrison* v. *Walton, supra,* it is said: "The doctrine of virtual representation has been introduced, by which certain parties before the court are regarded as representing those coming after with contingent interests. Citing *Baylor* v. *DeJarnett, supra.*

If, however, these children had both been in being and had been parties to the suit, the sale to Sallie E. Woods would not have deprived them of their interest in the land. It is well settled that a co-owner cannot purchase an outstanding title except for the common benefit. The purchase made by Sallie E. Woods from the commissioner, for which she discharged the small liability upon the land of $180, enured to the benefit of her children who were co-owners with herself, and they were not deprived of their rights and interests by the deed being made to their mother alone. She was merely paying off a small incumbrance against the lands owned jointly by herself and her children, and is entitled to credit for such payment in any settlement made with her co-owners. *Forrer* v. *Forrer,* 29 Gratt. (70 Va.) 134; *Buchanan* v. *King,* 22 Gratt. (63 Va.) 414; *Pillow* v. *Southwest Va. Imp. Co.,* 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 809; *Va. Coal, &c., Co.* v. *Kelly,* 93 Va. 332, 24 S. E. 1020.

It further appears that in 1886, prior to the marriage of Samuel F. Woods, he conveyed the property in contro-

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versy to a trustee to secure a debt of $186.25. Thi
subsequently became the property of Rachael Cl
and was paid off by Sallie E. Woods with money
she borrowed from Virginia Dickerson and secured
by deed of trust on the property. The property was
satisfy this debt and bought by Virginia Dickerson
amount due her. Virginia Dickerson having received
from the trustee, subsequently reconveyed the land
lie E. Woods. Whatever change these transaction
have made in the title, the interests of the children
property were not affected thereby. Sallie E. Woo
no power to convey as security for the Dickerson del
thing more than her undivided interest in the pr
A deed from a tenant in common carries to the g
only an undivided interest in the property, no mat
what description the property is conveyed. *Wo*
Early, 95 Va. 307, 28 S. E. 374; *Parker* v. *Brast,* 45 V
399, 32 S. E. 269.

When, therefore, the property was reconveyed to
E. Woods by Virginia Dickerson, she took and h
under the same terms and conditions as before she
with it. Apart from this view, Virginia Dickerson
party to the suit of *Woods* v. *Woods,* and had constr
if not actual, notice of every fact therein showing
terest of the children in the land and the limited i
of Sallie E. Woods therein.

There being no error in the ruling that the child
Sallie E. Woods had a vested interest in the land, t
cuit court properly held that the appellants could
compelled to accept a defective title, and properly
them the privilege of accepting or not, as they chos
title as their vendors had. The appellants having de
to accept the unsatisfactory title, the court prope
rected the property to be returned to the parties to
it belonged.

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As already stated, the appellants were placed in possession of the land when the contract of sale was executed. The circuit court held that the party in possession of the land was liable to the owners thereof for a reasonable rent during the period of his occupancy, subject to a credit for such part of the purchase money as was paid, less the value of any permanent improvements placed on the land by the appellants, and referred the cause to a commissioner to take an account showing what balance of rent, if any, was due by the party in possession. This action of the court is assigned as error.

As to the matter of rent due, if any, no amount has been ascertained or fixed. Whether upon the coming in of the report ordered it will be held that the parties are entitled to any decree for rent, and if so whether the amount will be sufficient to give this court jurisdiction, has not yet developed. As to this subject the decree appealed from would seem to be interlocutory merely; but be that as it may, it is, we think, settled that where real estate is sold and the vendor cannot give a good title, but puts the vendee in possession, who makes improvements thereon, if an accounting is taken, the rents and profits up to the time of the decree for the surrender of the property are to be offset against the improvements. The vendee is chargeable with reasonable rents and profits, and with any waste committed by him. *Hoover* v. *Calhoun,* 16 Gratt. (57 Va.) 109; *Walker* v. *Beauchler,* 27 Gratt. (68 Va.) 511. That the costs are in the discretion of the court cannot be questioned, and its action will not be reversed, except upon a clear showing of abuse. *Dillard* v. *Dillard,* 77 Va. 820. There is nothing in the case at bar to show any abuse of the court's discretion, or any reason for disturbing its award of costs against the appellants.

Upon the whole case we find no error in the decree appealed from and it is affirmed.

Affirmed.

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Syllabus.

Richmond

GRIEF v. KEGLEY, JUDGE.

November 20, 1913.

1. TAXATION—*Mineral Lands—Erroneous Assessment—Co*
The manner in which erroneous assessments of min
may be corrected is specially provided for by section 4
Code (1904) and amendments thereof, and is entirel
from that of other lands. The correction of minera
sessments is placed under the jurisdiction of the Stat
tion Commission by said section 437-a and amendmen
and is excluded from the operation of sections 567, 5
of the Code (1904) relating to the assessment of o
by the express provisions of section 567, and hence t
of Public Accounts has no right to file a petition to
order made correcting an alleged erroneous assessme
eral lands, and the circuit court has no jurisdictio
any order in a proceeding founded on such petition.
2. PROHIBITION—*When Writ Lies.*—The writ of prohibition d
to correct error, but to prevent the exercise of the j
of the court by the judge to whom it is directed, eit
he has no jurisdiction at all or is exceeding his ju
If the court or judge has jurisdiction to enter any o
proceeding sought to be prohibited, the writ does

Original application for writ of prohibition.

Writ Aw

The opinion states the case.

J. J. A. Powell, for the petitioner.

Samuel W. Williams, Attorney General, for
fendant.

BUCHANAN, J., delivered the opinion of the cou

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Max Grief filed his petition in this court praying that the Honorable Fulton Kegley, judge of the circuit court of Bland county, be prohibited from further proceeding upon a petition filed in said court by the Auditor of Public Accounts, seeking to have reheard an order made by that court upon the motion of Max Grief correcting an alleged erroneous assessment of mineral land.

Section 437-a of the Code, as amended by an act of Assembly approved February 19, 1910 (Acts 1910, pp. 52-54), provides for the special and separate assessment of all mineral lands, improvements, fixtures and machinery thereon, and for the entry of such lands on the land books separately from other lands charged thereon. It further provides that a copy of such assessment shall be certified to the State Corporation Commission with the name and post-office address of each person, firm or corporation in whose name any such lands or interests therein have been assessed upon the land books with the amount of tax extended thereon. Upon receiving such copy it is made the duty of the State Corporation Commission to examine into the justice of such assessments, and if it shall appear to the commission that any tract of land or any part thereof or improvements, etc., thereon has not been assessed at its fair market value, the said commission shall direct the Commonwealth's attorney for the county or corporation wherein such land is situated, or any special attorney it may designate, to apply in the name of the Commonwealth to the circuit court for the county, or corporation court of the city, to have said assessment corrected. It further provides that any person feeling himself aggrieved by such assessment may apply to the same court to have the assessment corrected.

Under the provisions of this act Max Grief, the petitioner in this case, moved the circuit court of Bland county to correct an alleged erroneous assessment of his lands lying in said county. Upon a hearing of his motion,

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which was defended by S. W. Williams, Jr., spe
torney for the Commonwealth, the court granted th
prayed for by the land owner, Grief, by an order
October 23, 1912.

On March 12, 1913, C. Lee Moore, Auditor of Pu
counts, offered to file his petition for a rehearing
order. His petition was objected to by Grief, t
owner, upon the grounds,

"(1) That section 573 of the Code, under whi
petition by its terms is offered to be filed, has no
tion to mineral assessments, but applies to gen
sessments;

"(2) That the Auditor is not a proper party to m
motion in the matter, and that section 437-a, unde
the original notice was had, gives full proceedings
matter by appeal at the instance of the Corporatio
mission and not by the Auditor."

These objections were overruled and the petit
leave of the court, was filed.

By section 567 of Pollard's Code it is provided t
person assessed with taxes on lands, or other prop
a license tax, aggrieved thereby, may, "unless ot
specially provided by law," apply within a time na
relief to the court in which the commissioner gave b
qualified, or to which or to whose clerk such bond
certificate of his qualification were returned. That
requires the attorney for the Commonwealth to def
motion, and that the commissioner making the ass
or his successor in office shall be examined as a
touching the application, and the facts proved cer

Section 568 provides when the court may order
sessment to be corrected, and requires a copy of an
made under it correcting an erroneous assessmen
certified by the court to the Auditor of Public A
and the Treasurer of the State.

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By section 573 of Pollard's Code it is provided that "if om the statement of facts or other evidence the Auditor Public Accounts shall be of opinion that the order of e court granting the redress is erroneous, he may, within ie year from the time such order is made, file a petition r a rehearing of such application. Said petition, which to be in the name of the Commonwealth, is to be pre- nted and the hearing conducted by the attorney for the ommonwealth, and the case reheard as if there had been previous hearing.

It is clear, as it seems to us, from a comparison of the ovisions of section 437-a of the Code, as amended by the t of February 19, 1910, with the provisions of sections 7, 568 and 573 of the Code, that the petition filed by the uditor for a rehearing of the application of Max Grief, d the order entered in that proceeding by the circuit urt at its October term, 1912, is without authority of w. The manner in which erroneous assessment of min- al lands may be corrected is specially provided for by ction 437-a of the Code and amendments thereto, and, erefore, by the express provisions of section 567, the cor- ction of mineral land assessments is excluded from the eration of that section and sections 568 and 573.

By section 437-a and amendments thereto, copies of the sessments of mineral lands or interests therein are to be rtified to the State Corporation Commission. Upon re- ipt of such copies it is made the duty of that commission examine into the justice of any such assessments, and if shall appear to the commission that any tract of land, any part thereof, or the improvements, fixtures or achinery thereon, or any right or interest in the same, any part thereof, has not been assessed at its fair market lue, the commission is required to direct the Common- ealth's attorney for the county or corporation where the ssessment was made, or any other special attorney it may signate, to apply in the name of the Commonwealth to

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the proper court to have the assessment correct
original assessment is made by the assessor or
sioner of the revenue as the case may be, subje
action of the State Corporation Commission, and
mission is authorized to employ for the purposes
"such person or persons as may be necessary to m
the assessor or commissioner of the revenue, suc
into the value and such examination of the propert
terests required by this act to be separately asse
of the improvements, fixtures and machinery the
may deem necessary." That section further provi
the person or persons employed by the State Co
Commission may be required to give aid to the
wealth's attorney or any special attorney that
employed by the said commission in prosecutin
fending any application for the correction of an
ment under this act by obtaining and giving inf
of facts, names of witnesses or otherwise." Fro
cision of the trial court in the proceeding to cor
erroneous assessment both parties are expressly
right of appeal.

The provisions of section 437-a as amended fu
the necessary machinery for fully protecting the
the Commonwealth in proceedings to correct erro
sessments of mineral lands. They clothe the Co
Commission with the power and impose upon it
of seeing that the mineral lands of the Commonw
assessed at their fair market value.

Section 437-a as amended confers no power and
no duty upon the Auditor of Public Accounts to
the Commonwealth in the proceedings provided
section for the correction of erroneous assessment
eral lands. It confers that power and imposes t
upon the State Corporation Commission, and it
fest when that section is read in connection with
24 of the Code that the legislature never intend

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der the provisions of section 573 of the Code, the Auditor Public Accounts should also represent the Commonalth in proceedings for the correction of erroneous assments of mineral lands, and have the right to have reard any decision in such a proceeding which he might em erroneous, although the State Corporation Commison might be fully satisfied that the decision was correct. The next question is: Is this a proper case for a writ prohibition?

It is well settled that the writ of prohibition does not to correct error, but to prevent the exercise of the risdiction of the court by the judge to whom it is dited, either where he has no jurisdiction at all, or is ceeding his jurisdiction. If the court or judge has jurstion to enter any order in the proceeding sought to be ohibited, the writ does not lie. *Fidelity, &c. Co.* v. *Beale, dge,* 102 Va. 295, 303, 46 S. E. 307; Burks' Pleading and actice, 777-779, and cases cited.

The averments of the petition of the Auditor show that is a proceeding under section 575 of the Code. As we ve seen, that section gives the Auditor no authority to a petition in any proceeding instituted under the proions of section 437-a as amended for the correction of erroneous assessment of mineral lands. Neither has circuit court jurisdiction to consider or grant any ref in such a proceeding upon a petition filed by the Audi. As the Auditor has no right to file a petition to rehear order entered in the proceeding instituted by Grief, der section 437-a of the Code as amended, for the cortion of the erroneous assessment of his mineral lands, l as the circuit court has no jurisdiction to enter any der in such proceeding upon the petition of the Auditor, follows that the petitioner is entitled to a writ of proition, as prayed for.

Writ Awarded.

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Richmond

HOUSE v. UNIVERSAL CRUSHER CORPORATIO

November 20, 1913.

Absent, Whittle, J.

1. PROCESS—*Return—Judicial Notice.*—Process to commenc part of the record for the purpose of amendment, an will look to the return thereon, when necessary, n show the date of the return, but also the date of th of the writ.
2. RULES—*Failure to File Declaration—Dismissal.*—The po clerk to dismiss an action at rules for failure to file tion, under section 3241 of the Code, only arises process is returned executed as to one or more of the
3. PROCESS—*Time of Service—Return—Judicial Notice.*— cess returnable to November rules, which begin N is returned executed October 23, it sufficiently ap the return that full ten days elapsed between the the process and the return day thereof. The time f mencement of the terms of the several courts is fix eral law, of which the court takes judicial notice.
4. RULES—*Failure to File Declaration—Dismissal—Case* Where process to commence a suit is returned execu November rules (being November 4), the clerk has n dismiss the suit for want of a declaration at the firs rules following, where, under the provisions of se the latter rules fall on November 25, as one mon elapsed since the process was returned executed.

Error to a judgment of the Circuit Court o county in an action of trespass on the case. Judg the defendant. Plaintiff assigns error.

Re

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The opinion states the case.

S. B. Quillen and *W. A. Ayers,* for the plaintiff in error.

Burns & Kelley, for the defendant in error.

KEITH, P., delivered the opinion of the court.

Plaintiff in error instituted, in the circuit court of Russell county, an action of trespass on the case against the Universal Crusher Company. Process was issued, returnable to the first November rules, 1912, and the clerk made the following entry upon his rule book:

"1912. 1st November rules. Process executed and continued for declaration. 1912. 2nd November rules. Continued for declaration. 1912. 1st December rules. Dismissed for want of declaration."

At the ensuing term of the circuit court the plaintiff in error moved the court to be permitted to file his declaration, to which the defendant objected; whereupon, the court rejected the motion and refused to permit the declaration to be filed, and the suit stood dismissed; and thereupon a writ of error was awarded by one of the judges of this court.

The petition insists that the return of the process "executed" is not sufficient, but is wholly void under section 3227 of the Code.

We do not deem it necessary to pass upon the question thus raised, for its decision is immaterial to the proper disposition of this case. Process to commence a suit is part of the record for the purpose of amendment, and the court will look to the return thereon when necessary, not only to show the date of the return, but also the date of the execution of the writ. *Sands* v. *Stagg,* 105 Va. 444.

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Section 3241 of the Code provides that "if one elapse after the process is returned executed as to a or more of the defendants, without the declaration being filed, the clerk shall enter the suit dismis though none of the defendants have appeared."

In this case the writ was returnable on Monday, ber 4th, which was the first rule day. The service of was then noted and the case was continued for a d tion. At second November rules it was again con for a declaration, and at the December rules it w missed.

Now section 3236 of the Code provides that rule be held on the first and third Mondays in every mon shall continue for three days, but that where the ter circuit court or the chancery court of the city o mond, or of a corporation court designated for the civil cases in which juries are required, happens t mence on the first or third Monday in a month, or on of the two following days, the rules which would oth have been held on the first or third Monday, as th may be, shall be held on the Monday of the preceding

The time for the commencement of the terms several courts is fixed by general law of which the takes judicial notice. The December term of the court of Russell county commences, according to l the Tuesday after the first Monday, so that the De rules were thrown back to the last Monday in Nov which occurred on the 25th The process having b turned on Monday, November 4th, and December ru curring on Monday, November 25th, and the clerk entered, as appears by the record, the dismissal of th for want of declaration at first December rules, one had not elapsed after the process was returned exe and it follows that the case should have been reste

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e docket and plaintiff in error permitted to file his eclaration.

We are of opinion that the judgment must be reversed nd the case remanded for further proceedings to be had ot in conflict with this opinion.

Reversed.

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Richmond

ISAACS v. ISAACS.

November 20, 1913.

Absent, Buchanan and Whittle, JJ.

1. DIVORCE—*Decree for Alimony—Effect on Property—Judgmen Another State.*—A decree for alimony rendered by a cou this State, having full jurisdiction over the parties and subject matter of the suit, in so far as it affects the righ property established by said decree, cannot in any wis affected by a decree rendered by a court of another State suit between the same parties.

Appeal from a decree of the Circuit Court of Rus county in several suits heard together.

Reverse

The opinion states the case.

Vicars & Peery, W. W. Bird and *Routh & Routh,* the appellant.

Finney & Wilson, for the appellees.

KEITH, P., delivered the opinion of the court.

The bill in this case was filed by S. F. Isaacs as guard of certain infant defendants, setting out that G. G. Isa the former guardian of the infants, had confessed a ju ment as such guardian in the circuit court of Rus county for the sum of $1,811.75, with interest from Ma 13, 1909, and praying that certain real estate of the fendant in the counties of Russell and Wise might be

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and the proceeds applied to its satisfaction. This bill was filed at the first April rules, 1909, and on the 18th day of May of that year Minnie L. Isaacs filed her petition in which she alleges that the judgment set forth in the bill is fraudulent and void, so far as her rights are concerned, and was confessed for the purpose of hindering and delaying her in the enforcement of a decree for alimony and suit money rendered in her favor upon her bill filed in the circuit court of Wise county, in which G. G. Isaacs was defendant.

In the divorce suit J. H. Darter was appointed to receive any money decreed to Minnie L. Isaacs for her support and that of her infant children, and the prayer of her petition is that she and J. H. Darter may be made parties defendant to the bill filed by S. F. Isaacs for the enforcement of his judgment against G. G. Isaacs.

The pleadings are in a confused state by reason of the several bills, answers and cross-bills which were filed, and without going into them in detail we shall content ourselves with stating that in the divorce suit in Wise county a decree was entered on the 11th day of July, 1908, enjoining and restraining G. G. Isaacs from selling or in any way disposing of any of the property, either real or personal, set forth in the bill of complaint, "so the said property, both real and personal, and said estate shall be forthcoming to meet any decree which may be made in this cause."

On the 11th day of January, 1909, a further decree was entered in the divorce suit in Wise county, in which it was decreed that the defendant pay to J. H. Darter, receiver, the sum of forty dollars, "temporary alimony for the month of January, $10.00 having been paid in cash to complainant, and that said defendant pay to J. H. Darter on the first day of each month until the further order of this court the further sum of fifty dollars per month for temporary ali-

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mony for complainant; and the said J. H. Darter is ordered to pay unto said complainant the sum of $ cash each month out of the said money received by the defendant and to furnish to complainant such apparel and supplies as complainant may desire for and children to the amount of forty dollars each the residue of the said alimony hereby directed to b and the said J. H. Darter is directed to furnish an i account of the supplies and wearing apparel fu complainant pursuant to this order and to file the the papers of this cause on the first day of the ne of this court."

Next in order after these decrees comes the cor of judgment set out in the original bill filed by S. F. dated February term, 1909, for $1,811.75, with from the 12th of March, 1909, and costs.

On the 4th of February, 1910, a further decree tered in the circuit court of Wise county, in whi adjudged and ordered that "Minnie L. Isaacs be an hereby granted a divorce from bed and board fr defendant, G. G. Isaacs, and the complainant and ant be and they are hereby perpetually separated it is further adjudged, ordered and decreed that straining order heretofore rendered herein on the 1 of July, 1908, be and the same is hereby perpetuat that the defendant, G. G. Isaacs, is perpetually e and restrained from in any way interfering with sa plainant and her infant children mentioned in said complaint, or of doing any violence to them or ei them; and that said defendant is also perpetually e and restrained from selling or in any way disposing of the property, real or personal, named and set forth bill of complaint, during the lifetime of complainan that said property, both real and personal be and th is hereby held as security for the payment of the a

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hereinafter decreed in favor of complainant as well as the alimony heretofore decreed in favor of complainant, and the costs of this suit, and the unpaid attorney's fee adjudged to be paid by the defendant, G. G. Isaacs, to counsel of complainant for their services in the prosecution of this suit. And it is further adjudged, ordered and decreed that the defendant, G. G. Isaacs, do pay to complainant the sum of fifty dollars per month, due and payable on the first day of each and every month from the date hereof during the lifetime of complainant, as well as the alimony heretofore decreed to be paid to her, and that said defendant shall pay unto Vicars & Peery and H. A. Routh, attorneys for complainant, the sum of one hundred and fifty dollars, counsel fees, the said defendant having heretofore paid to the said Vicars & Peery on account of counsel fees the sum of fifty dollars; the court being of opinion that the sum of two hundred dollars is a reasonable sum to be paid by the said G. G. Isaacs, defendant, as counsel fees to the said attorneys of complainant for their services in the prosecution of this suit. And it further appearing to the court from the report of J. H. Darter, receiver, filed herein, that the defendant, G. G. Isaacs, has only paid the sum of one hundred and forty dollars on account of temporary alimony heretofore adjudged and decreed to be paid by him to the said J. H. Darter, receiver, for the benefit of complainant, by decree rendered herein on the 11th day of January, 1909, and that the said G. G. Isaacs has refused to pay the said alimony and comply with the terms of said decree of January 11, 1909, aforesaid, and that there remains now unpaid on account of said temporary alimony the sum of five hundred and ten dollars, with interest thereon from the date hereof; it is therefore adjudged, ordered and decreed that complainant recover against defendant the said sum of five hundred and ten dollars, with interest thereon from the date hereof, and her costs about the prosecution

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of this suit in this behalf expended . . ;" and the
further directed that unless the sum decreed wer
within thirty days, H. A. Routh should sell the prop
the bill and proceedings mentioned, or a sufficien
thereof, at public outcry at the front door of the
house of Russell county, at Lebanon, to satisfy ar
charge the said sum of five hundred and ten dollar
interest, and the costs of the suit, and the sum
hundred and fifty dollars decreed to be paid as att
fee for the complainant, and all of the unpaid alimo
and unpaid at the time of the sale, under the terms
decree of February 4, 1910.

Such was the condition of affairs when G. G. Isa
a supplemental answer to the cross-bill filed by Mi
Isaacs in the Russell county suit, appeared with what
to be the transcript of the record of a suit in the
court of Harlan county, Kentucky, from which we
that on or about March 21, 1910, George G. Isaacs,
ing to be a resident of and domiciled in Harlan c
Kentucky, filed his petition setting forth his marriag
the defendant, Minnie L. Isaacs, that she had aba
and deserted him and had been guilty of adulter
certain persons, one of whom is named in the petitio
amended petition was filed setting out his case m
large. The defendant was cited to appear and did
by counsel, and filed her answer, in which she deni
the plaintiff ever had any residence in the State o
tucky, denies all charges of abandonement and ad
made against her, sets forth the proceedings in the
court of Wise county; and in fact, we may say, sh
in issue every allegation of the petition, with the resu
the Harlan county court entered a judgment dis
the bond of matrimony theretofore existing betwe
plaintiff and defendant and restoring the plaintiff,
G. Isaacs, to all the rights and privileges of an unm

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erson; and further adjudging that "the parties hereto nd each of them, are ordered and directed to restore to he other all property not disposed of at the commencement f this action which they may have obtained directly or ndirectly, from or through the other, during marriage, in onsideration or by reason thereof."

On December 13, 1910, in the circuit court of Russell ounty, the cases of *S. F. Isaacs, Complainant,* v. *G. G. saacs, Defendant,* and *Minnie L. Isaacs, Complainant,* v. *. G. Isaacs and Others, Defendants,* on cross-bill, were rought on to be heard together, upon depositions taken nd filed in the cause, and upon the supplemental answer f Isaacs to the cross-bill, upon the exhibit of Harlan ircuit court proceedings filed with the answer, to the ling of which supplemental answer Minnie L. Isaacs ob- ected and filed exceptions, and upon the agreement of ounsel representing all parties in interest. Thereupon, he court, without passing upon the objection of Minnie L. saacs to the filing of the supplemental answer, or to the alidity of the plaintiff's judgment asserted in the original ill, or to the validity of the decree for alimony, referred he case to a commissioner to ascertain and report "what nd the said G. G. Isaacs is now siezed of, subject to the ens asserted against him in this cause, what of the lands ave been sold that are set forth and described in com- lainant's bill since the original bill was filed in this ause, and to whom sold and for what purpose, and upon hat debts, if any; what said land brought and what pur- hase money had been paid, and to whom paid; and rental alue of all lands now owned by the said G. G. Isaacs in the ounties of Russell and Wise, whether or not there are ny unpaid taxes thereon, and all liens of all character gainst the said G. G. Isaacs, together with what land he wns subject to said liens."

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On the 17th day of April, 1911, the commissio
chancery filed the report called for in that decree.
report Minnie L. Isaacs excepted, because it reports
G. G. Isaacs a judgment alleged to have been co
at the February term, 1909, of the circuit court
sell county, and the charge made by exceptant in
swer and cross-bill, that this judgment was confes
the purpose of hindering, delaying and defrauding
the collection of the amounts decreed in her favor
circuit court of Wise county is reiterated.

This exception was overruled by the circuit court,
decree in that respect is hereby affirmed. The e
adduced in the record is insufficient to establish the
of fraud.

The report was excepted to also by S. F. Isaacs an
Isaacs, because the commissioner as lien No. 2 repo
judgment in the circuit court of Wise county for t
of $50 a month from the 11th day of January, 19
the further sum of $200 with interest from the 4th
February, 1910, subject to certain credits stated
report. This lien is excepted to, first, because it h
paid, and, second, because the decree under which
asserted has been set aside and annulled. These
tions the decree appealed from sustained, but no re
assigned in the decree for the action of the court.

We are unable to discover in the record evidence t
decrees in favor of the appellant in the divorce su
ever been paid and satisfied to her.

The next ground of exception is because the decre
which said lien is asserted has been set aside and an
The exception refers, we presume, to the proceedi
the circuit court of Harlan county, Kentucky. Wh
have been the effect of the decree of that court up
personal status of the parties plaintiff and defenda
shall not undertake to inquire or decide. Let it b

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ceded that while the Virginia court only went so far as to grant a mere separation—a divorce from bed and board and not from bonds of marriage—the Kentucky decree rightfully, under the circumstances and proofs before it, went further and dissolved the marriage theretofore existing between the parties. It can in no wise, we think, affect the rights of property established by the courts of this State, which had full jurisdiction over the parties and the subject matter of the suit.

We are of opinion, therefore, that notwithstanding the proceedings and judgment in the circuit court of Harlan county, Kentucky, the decrees of the circuit courts of Wise and Russell counties with respect to the alimony awarded Mrs. Isaacs and the counsel fees decreed to be paid to her attorneys remained in full force and effect; and that the exception filed by S. F. and G. G. Isaacs to lien No. 2, as reported by the commissioner, should have been overruled.

That the lien, to the extent that it is reported by the commissioner in favor of Mrs. Minnie L. Isaacs is a valid and subsisting one, we have no doubt; and we are not prepared to say that the chancery court having acquired jurisdiction over the subject matter and over the parties in the Wise county suit, and having granted a divorce from bed and board and fixed the permanent alimony of Mrs. Isaacs at $50 a month during her life, does not override and take precedence of the judgment confessed by G. G. Isaacs after the institution of the suit and the entry of the decrees of the 11th of January, 1909, and of February 4, 1910. The question is one of great interest and importance and should only be decided after full investigation by counsel and the court. We shall, therefore, content ourselves for the present with reversing the decree appealed from, in so far as it sustains the exceptions taken by S. F. and G. G. Isaacs, and will enter a decree to that effect, and directing the circuit court to refer the case to a commissioner to ascertain and report

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what amount is due for alimony and suit money upon
statement of the decree upon the basis heretofore cons
ered by the commissioner in his report; and what amou
would be due as alimony and suit money if the court sho
be of opinion that the monthly instalments of alimony
crued and accruing under the decrees heretofore ente
in the divorce suit constitute a primary charge upon
the real estate of G. G. Isaacs within the jurisdiction
the court.

Reversed

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Syllabus.

Richmond

JACOBS v. WARTHEN.

November 20, 1913.

APPEAL AND ERROR—*Bills of Exception—Rulings on Evidence—What to Be Inserted.*—A bill of exception to the ruling of the court on the admissibility of evidence is not sufficient, although it gives the question asked the witness and his answer thereto, unless it also contains sufficient of the evidence which has preceded to give this court a clear apprehension of the propriety or impropriety of the ruling of the trial court.

2. EVIDENCE—*Order of Introduction—Discretion of Trial Court.*—Much latitude of discretion should be allowed the trial court in the matter of the examination of witnesses, and its ruling will not be reversed merely because evidence proper in chief was introduced in rebuttal.

3. SALES—*Proof of Sale—Burden.*—In an action to recover the purchase price of personal property sold, the burden is on the plaintiff to prove the sale, but if the defendant denies the sale he has the burden of showing that the property came into his possession in some way other than by bargain and sale.

4. SALES—*Offer and Acceptance—When Title Passes.*—If an offer to sell personal property at a stated price is accepted, and nothing remains to be done to complete the contract, title passes as soon as the offer is accepted.

5. SALES—*Representations of Soundness—As of What Time Applied.*—Representations of the soundness of personal property sold are to be applied as of the time the sale is consummated and the title passes, and not of any subsequent time.

6. SALES—*Caveat Emptor—Fraud.*—In all sales of personal property the doctrine of *caveat emptor* applies, except when there has been a warranty or deception or some fraud, or a deception upon the part of the seller, misleading the buyer to his injury, and upon which the buyer relied.

7. FALSE REPRESENTATIONS—*Burden of Proof.*—A defendant who relies upon false representations of the plaintiff as a defense to an action to recover the purchase price of property has the burden of showing, by a preponderance of affirmative evidence, that the representations were made by the plaintiff, were false, and that the defendant relied upon them and was injured by reason of their falsity.

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8. WARRANTIES—*Breach—Burden of Proof.*—The burden
defendant who relies upon a breach of warranty of
of personal property, to prove the warranty and its
a preponderance of affirmative evidence.

9. SALES—*Breach of Warranty—Rescission—Damages.*—Wh
has been a breach of warranty of personal property
purchaser may either rescind the contract, if, within
able time, he notifies the seller of his intention so
offers to restore the property, in which event the c
terminated and the parties are restored to their form
or he may retain the property and claim as damage
the seller the difference between the value of the pr
warranted and its actual value at the time of the sal

10. WARRANTIES—*What Constitutes a Warranty.*—To constitu
ranty no particular form of expression is required. An
intention to warrant is sufficient. It is enough if t
used import an engagement on the part of the seller
article is what he represents it to be. Any distinct affir
quality made by the seller, at the time of the sale,
the negotiations that led up to the sale, not as an e
of opinion or belief, but as an assurance to the pur
the truth of the fact affirmed and an inducement to hir
the purchase, is, if accordingly received and relied on
upon by the purchaser, an express warranty.

11. INSTRUCTIONS—*Correct Verdict.*—It is unnecessary to co
rulings of the trial court on instructions where no oth
than that rendered could have been properly found up
instructions.

Error to a judgment of the Circuit Court of
county in a proceeding by motion for a judgm
money. Judgment for the plaintiff. Defendant
error.

Affi

The following instructions were given by the c
motion of the plaintiff:

I. The court instructs the jury that while the bu
proof is upon the plaintiff, Warthen, to show that
the three horses to Jacobs, yet the burden of proof
Jacobs to establish that the horses came into his po
in some way other than by bargain and sale.

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II. The court instructs the jury that if they believe from he evidence that Warthen offered to sell to Jacobs the endennis mare, the Black Cock horses, and the Semper go horse at the price of $1,050, and that said offer was ccepted by Jacobs, and nothing remained to be done by Varthen to complete the contract, then title passed from Varthen to Jacobs as soon as the said offer was accepted.

III. The court further instructs the jury if they believe om the evidence that there was a sale of the three horses y Warthen to Jacobs, then in considering whether the aid hoses or any of them were unsound, the jury are con- ned to the condition in which the said horses were at the me the said sale was consummated and title passed, the ourt telling the jury that it is immaterial whether the orses or any one of them were injured or in a crippled ondition after title passed to Jacobs, provided they were ninjured and sound when title did pass.

IV. The court instructs the jury that in all sales of per- onal property, the doctrine of *caveat emptor,* or let the uyer beware, applies, except when there has been a war- anty or deception or some fraud, or a deception upon the art of the seller, misleading the buyer to his injury, and pon which the buyer relied.

V. The court instructs the jury that although they may elieve from the evidence that the defendant purchased e horses at an agreed price to be paid for when sold, yet a matter of law the time of payment in such a case would a reasonable time after the delivery of said horses to the fendant. The court also instructs the jury that if the fendant relies upon the representation of the plaintiff hich he alleges to be untrue, the burden of the proof is pon the defendant to establish that the plaintiff made e representations, that the same were false, and that the fendant relied upon them, and was injured by reason their falsity, the court telling the jury that to bear this

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burden the defendant must do so by preponde
affirmative testimony.

VI. The court instructs the jury that although
believe from the evidence that the Semper Ego hor
crippled and was crippled when he arrived at Jaco
yet if they believe that the said horse was sold t
then Warthen cannot be held responsible for an
which may have occurred after said sale was cons
and title passed, the court telling the jury that th
even though they should believe from the evide
Warthen warranted his soundness.

VII. The court instructs the jury that if they beli
the evidence that there was a sale by Warthen t
and that at the time of the sale the Semper Ego h
apparently sound, it matters not what the conditi
horse was on the road or when he arrived at Jacob
unless they believe from the evidence that War
pressly warranted his soundness or knew that he
sound, or had any knowledge of his being unso
court telling the jury that the burden of the proof
Jacobs to establish such a warranty or knowledg
part of Warthen by a preponderance of affirma
timony.

VIII. The court instructs the jury that if a sel
rants the property sold, and there is a breach of
ranty, the purchaser has the election between tw
dies. First, he may rescind the contract, if withi
sonable time he notifies the seller of his intention
and offers to restore the property. In such case
tract is terminated, and the rights of the parties r
if no contract had ever existed between them. Th
erty belongs to the seller and the purchaser is not li
the purchase price, and may recover any reasona
penses to which he may have been exposed. But in
entitle the purchaser to this remedy, he must, af

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discovery of the breach, act with reasonable promptness in notifying the seller and making offer to restore the property. If he unreasonably delays or does any act in recognition of the contract after knowledge of the breach, he is concluded by the election he has made and must take the property. Nor is he permitted to rescind the contract in part, enforcing it so far as it is favorable to him and reject it so far as it is unfavorable to him. He must rescind as a whole or accept as a whole. He has also but one election. Having elected to stand on the contract he cannot afterwards reject it. Secondly, he may accept the goods and abide by the contract, and rely upon his damages for the breach of the warranty, in which case the property is the property of the purchaser, but he is entitled to set off against the purchase price such damages as he may be entitled to by reason of the breach of the warranty. The measure of damages in such a case is the difference between the value of the property as warranted, and the value of the property as it actually was at the time of the sale.

IX. If the jury believe from the evidence that there was no sale, but that the property was delivered to the defendant to be sold at an agreed price upon a warranty that the property was sound, and the property was unsalable because the property was not as warranted, then it was the duty of the defendant to notify the plaintiff of the breach of the warranty and offer to return the property to him, and he can recover no damages until his offer to return has been made to the plaintiff. His damages in such case would be any expense to which he may have been exposed for the keep of the property after he has offered to return the same, less any profit he may have made out of the contract. The jury are instructed that the defendant should be entitled to set off the $25.00 due by the plaintiff to him if they believe that plaintiff owes him that sum.

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At the request of the defendant the court gave the following instruction:

1. The court instructs the jury that to constitute a warranty no particular form of expression is required, an apparent intention to warrant is sufficient. It is enough if the words used import an engagement on the part of the vendor that the article is what he represents it to be. Any distinct affirmation of quality made by the vendor, at the time of the sale, or during the negotiations that led up to the sale, not as an expression of opinion or belief but as an assurance to the purchaser of the truth to the fact affirmed and an inducement to him to make the purchase, is, if accordingly received and relied on and acted upon by the purchaser, an express warranty.

Marshall McCormick and *F. B. Whiting,* for the plaintiff in error.

Downing & Weaver, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This action is brought by A. L. Warthen, upon notice under the statute, to recover of the defendant, E. B. Jacobs, the sum of one thousand and fifty dollars ($1,050.00) the purchase price of three horses, named Semper Ego, Black Cock and Pendennis, which were delivered to the defendant at the plaintiff's stables on April 1, 1911. The defendant at the calling of the case for trial filed the plea of the general issue in assumpsit and two special pleas, under oath, setting forth his defense: (1) That he had never bought the horses; and (2) that he took them to sell for the plaintiff, and had incurred expenses in the care and keep of them in the sum of $564.00, for which amount he was entitled to a judgment against the plaintiff, and al-

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leging that the plaintiff had warranted the horses to be sound and high class.

The theory of the plaintiff is, (1) That he sold to the defendant the three horses at the agreed price of $1,050, without a warranty; and (2) that although he did not warrant the horses to be sound, yet as a matter of fact they were sound when delivered to the defendant.

Upon the issue joined and the evidence introduced by the respective parties, the jury rendered a verdict in favor of the plaintiff, assessing his damages at one thousand and twenty-five dollars, for which amount and interest thereon from the date of the verdict the court entered its judgment, to which this writ of error was awarded.

It appears from the evidence that on March 30, 1911, the defendant, who resides in Clarke county, Va., and who was engaged in the buying and selling of horses, came to Front Royal, Warren county, and looked over the stables of the plaintiff. After doing so he informed the plaintiff that he had a customer in New York who would probably be pleased with the horse, Pendennis; and that he might also handle the Black Cock horse; but that he would be especially pleased to purchase Semper Ego, since he liked this animal better than any of the other horses which the plaintiff owned. Plaintiff informed defendant that Semper Ego was not for sale; that he had purchased him for his own use, but that he would be glad to dispose of any of the other horses which he then had in his stables. During the afternoon of the day of defendant's visit to plaintiff's stable, he asked permission to ride Semper Ego to the horse show grounds, a distance of about one mile from Front Royal, which was granted, and at the same time he took with him the horse Black Cock. The defendant, accompanied by a son of the plaintiff, and one William Smith, went to the show grounds, and attempted to jump Semper Ego. The horse, being green, never having been trained or

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schooled, refused to jump, but this did not seem to lessen defendant's admiration for the animal, he making the remark in the presence of young Warthen and Smith that he "had a boy who could break him if there was any break in him." Defendant rode Semper Ego back to plaintiff's stables, and left on the evening train for his home. The plaintiff was not then at home, and hence he had no further conversation with plaintiff since his refusal to sell or price the horse, Semper Ego. Upon defendant's arrival at his home, he called plaintiff over the 'phone, telling him that Semper Ego had "behaved very badly," but that nevertheless he liked him, and again insisted upon plaintiff selling him. Plaintiff, however, again refused to entertain any proposition of sale, again giving as his reason, that the horse was of a type that he liked and that he had determined to keep him for his own riding. On the following morning defendant wrote plaintiff as follows:

"March 31st, 1911.

"Dear Mr. Warthen:

"The girl to buy your Pendennis mare arrives Tuesday night, the 4th, and if the mare goes anything like right she will buy her. I wrote the man who was to come Sunday to put it off until he heard from me. I think he would buy your Black Cock or Mitchell horse. Also have a party who wants a hack for himself and one for his wife. I would like very much indeed to have your Semper Ego, and will run up to see you almost any time you have time to have an hour of heart to heart talk.

"Don't fail me on the Pendennis mare, as I will be in a real hole if I don't get her.

"Sincerely,

"EDWARD.

"Will send for Pendennis mare Monday."

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About the middle of the day that this letter was written defendant again called plaintiff over the 'phone to inquire if he had received the letter. Plaintiff replied that he had received it, and that rather than send the Pendennis mare alone, he would sell defendant the three horses, Black Cock, Pendennis and Semper Ego, for $1,100. Defendant replied that he didn't have the money at that time, and plaintiff then said that he didn't care for the money at that time, and if he (defendant) would take the three horses at $1,100 he could pay for them "as he got it out of the horses;" whereupon, defendant offered $1,000 for the three horses, and they finally "split the difference," fixing the price at $1,050, defendant agreeing to send his men for them on the following morning, April 1, 1911. On April 1 defendant sent two negroes for the horses, who arrived at plaintiff's stables after he had left for Baltimore, and the horses were turned over to them by William Smith in the presence of five other disinterested persons, one of them a veterinarian, all of whom have testified in this case that the horses were sound and uninjured when they departed for defendant's home.

Plaintiff heard nothing whatever from the defendant or the horses until the lapse of three weeks, when, on April 21, defendant wrote him as follows:

"Dear Mr. Warthen:

"I have been trying to get you over the 'phone for the past three days, but my 'phone has been out of order. I want you to come here to see the Semper Ego horse. My boy was all day getting him here, as he staggered and had to be led down some of the hills. He is better than he was, but when I brought him out yesterday to show to Twigg, I had to have a man on each side of the door to keep him from hitting his hips. Neither Twigg nor the Captain noticed it, so I had him put back as quick as I could, and

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told them he was too green yet for what Twigg wanted. I have phoned Humphrey and Cameron to come here today.

"Sincerely,

"EDWARD B. JACOBS."

It is readily to be observed that defendant admits that he was able to 'phone for veterinaries, but why, at the same time, he was unable to 'phone the plaintiff he does not explain; nor does he explain why his efforts to 'phone plaintiff were confined to the "past three days," when the horses had been in his possession for the past three weeks; hence, it was but natural for the plaintiff to believe, as he claims he did, that defendant or his employees, while attempting to school and jump the horse, Semper Ego, injured him, and having every reason to conclude that if, as defendant stated, the horse was injured when he arrived at defendant's home, he would not have waited three weeks before making complaint and paid no attention to the letter. The impressions of plaintiff, as was to be expected, were strengthened when on May 4 defendant sent him a certificate from the veterinary to the effect that the horse was "suffering from a severe strain over the loins which gives him a tottering gait."

Having heard nothing from defendant, plaintiff, on May 18, wrote him as follows:

"Dear Edward:

"I hope the Semper Ego has gotten O. K. I did not go into the matter with you, as I knew the horse was absolutely sound when he left my stable, and that I would have no trouble establishing that fact. Indeed, I think he was hurt after reaching 'Rosslyn,' but as I had no doubt that he would soon come around, I thought it useless to go into that. My understanding of the deal was that you were to pay me $1,050 for the three horses as they were sold.

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Of course, I did not understand that I was to assume any risk as to their being crippled or killed. Had they all three died next day I should have expected the $1,050. I have always thought you fair, and still think so, and am only writing that you may know my understanding. I would not have sold them to any one else on such terms, as I had to pay cash for them and did not make much profit on the three. Let me hear from you.

"With kind regards to Mrs. Jacobs, I am

"Sincerely yours,

"ARTHUR L. WARTHEN."

"Perkins did not buy a horse from any one."

In this letter, as will be readily noted, plaintiff sets forth his idea of the contract and reminds defendant that he would not have sold the horse, Semper Ego, to any one else on the same terms. Defendant in his reply to this letter on June 7, 1911, instead of denying a sale of the horses to him, enclosed to plaintiff his note for $450 for the Pendennis mare and the Black Cock horse, saying among other things: "These two horses, as you know, I would not have bought except to get the Semper Ego. They came here in the shape I saw them and I accept them. The Semper Ego came wabbling and stumbling." Notwithstanding, defendant also stated in the letter just mentioned that he was told of Semper Ego's injuries the next morning after he got him, he never mentioned the subject to the plaintiff for three weeks thereafter, and then by letter of April 21, 1911, copied above, said: "My boy was all day getting him here, as he staggered and had to be led down some of the hills. He is better than he was, but when I brought him out yesterday to show to Twigg, I had to have a man on each side of the door to keep him from hitting his hips. Neither Twigg nor the Captain noticed it, so I had him put back as quick as I could, and told them that he

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was yet too green for what Twigg wanted." To the letter of the defendant of date June 7, 1911, *supra,* plaintiff replied on June 9, 1911, declining to accept the note enclosed to him by defendant, and returned the same to him, and again insisted that he sold the three horses to the defendant for $1,050; that he could prove by others who saw the horses the afternoon before they started to defendant's home that the horse, Semper Ego, "was sound, nimble and nothing the matter;" that he could prove by defendant's neighbors that the horse was not crippled after he had gone two miles of the journey to defendant's home; and that defendant never mentioned to plaintiff or to his (defendant's) neighbors, or to any of plaintiff's friends, for ten days after the horse was received at defendant's home any trouble with the horse. "The certificate you sent me shows that the horse was probably hurt trying to jump him, and he never once saw a jump in my hands since you had him out at the show grounds. I, of course, would hate for you to lose money on the horses, but I neither guaranteed their life, nor did I guarantee that you would make money . . . Had I said to you, as I would to most men, the night before, 'Send me your note for $1,050.00 and you can have the horses,' you know you would have done it. Now because I trusted you I ought not to have to beg for it."

Defendant later agreed to give his note, endorsed by his wife, for the purchase price of the three horses, but on the following day he forwarded to plaintiff a note for $650 instead of the amount agreed upon, which note was returned, and on April 12, 1912, this action was instituted.

We deem it unnecessary to review the evidence further than we have done in stating the case, for it is sufficient to say that if the trial court did not err in admitting certain evidence objected to, or in giving or refusing instructions, the evidence, viewed as upon a demurrer thereto, is not only amply sufficient to sustain the verdict of the

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jury, but no other finding could have been properly made thereon.

Did the court err in permitting certain evidence to go to the jury? This question arises on defendant's bills of exceptions Nos. 1, 2 and 3, the first being to the court's ruling in permitting Captain Conrad, a witness offered in rebuttal by the plaintiff, "to be asked and to answer the question: 'Will you tell the jury whether or not that horse (referring to Semper Ego) was sound?' " Not only does the court certify in this bill of exceptions that both sides were given the fullest opportunity to develop their case, but the exception fails to set out what answer, if any, was given to the question, or was expected when the question was propounded; nor does it in any way bring to the attention of this court the evidence that preceded it, but leaves the court to an examination of the whole of the preceding evidence in order to know whether or not the question and the answer, or expected answer, thereto were proper.

The same is true of bill of exceptions No. 2.

Bill of exceptions No. 3 does not set out the questions asked the witness, over the objection of the defendant, and the answers made by the witness thereto, but as in exceptions Nos. 1 and 2, no reference is made to the evidence that preceded this evidence objected to, thus leaving this court to an examination of the whole of the preceding evidence in order to know whether the questions and answers were proper or not.

"A bill of exception to the ruling of the court on the admissibility of evidence is not sufficient, although it gives the question asked the witness and his answer thereto, unless it also contains sufficient of the evidence which has preceded to give this court a clear apprehension of the propriety or impropriety of the ruling of the trial court."

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Holleran v. *Meisel,* 91 Va. 143, 21 S. E. 658, and *Burton* v. *Siefert & Co.,* 108 Va. 338, 61 S. E. 933.

The principal object, however, in the three bills of exceptions just adverted to, was to save the point for review by this court, that the lower court erred in admitting in *rebuttal* the testimony of the *witnesses named* in the exceptions.

In *Burke* v. *Shaver,* 92 Va. 345, 23 S. E. 749, it was held: "The examination of witnesses lies chiefly in the discretion of the trial court, and its exercise is rarely, if ever, to be controlled by an appellate court. Much latitude of discretion should be allowed the trial court in the matter of recalling witnesses, and its action will not be reversed by an appellate court except for palpable error."

In *N. & W. Ry. Co.* v. *Morris,* 101 Va. 422, 44 S. E. 719, this rule was sanctioned and approved, the opinion saying: "It (this court) will not reverse merely because evidence proper in chief was introduced in rebuttal." See also *Pocahontas C. Co.* v. *Williams,* 105 Va. 708, 54 S. E. 868; *Bettman* v. *Skinner,* 113 Va. 24, 73 S. E. 436.

Even if bills of exceptions Nos. 1, 2 and 3 in the present case were properly to be considered, we find nothing in the record that would warrant us in regarding it as coming within an exception to the established rule to which we have just adverted.

The learned judge of the trial court gave to the jury seven instructions asked for by the plaintiff, two (8 and 9) of its own volition, and also instruction No. 1, asked by the defendant, rejecting defendant's instruction No. 2, to which ruling defendant excepted. The instructions given (and set out in the official report of this opinion) fairly and fully submitted to the jury the case on every material point involved, stating, as we view the instructions and the record, the defendant's rights and duties liberally, as well as justly and fairly. But even if the instructions

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were not correct, it is unnecessary to consider the rulings of the trial court thereon, since no other verdict than that rendered by the jury could, in our opinion, have been properly found. *Schwalm* v. *Beardsley,* 106 Va. 407, 56 S. E. 135; *Ches. & Ohio Ry. Co.* v. *Fortune,* 107 Va. 412, 59 S. E. 1095; *Vaughan* v. *Pleasonton,* 112 Va. 508, 71 S. E. 529; *W. V. Ry. Co.* v. *Bouknight,* 113 Va. 696, 75 S. E. 1032.

The rulings of the trial court complained of are without error and its judgment upon the verdict of the jury is, therefore, affirmed.

Affirmed.

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Syllabus.

Richmond

LIQUID CARBONIC COMPANY v. WHITEHEAD.

November 20, 1913.

1. TRUSTS AND TRUSTEES—*Trustee a Purchaser for Value—Liens—Notice—Burden of Proof.*—The trustee in a deed of trust to secure creditors is a purchaser for value, and if he is to be charged with notice of a prior right to or lien upon the property conveyed to him, the burden of proof to show such notice is on the party alleging it. The fact of notice, however, may be inferred from circumstance as well as shown by direct evidence and must be such as to affect the conscience of the purchaser, and so strong and clear as to fix upon him the imputation of bad faith. In the case at bar the trustee had such notice.
2. NOTICE—*Actual—Constructive.*—Actual notice and constructive notice, in any of its varieties, produce exactly the same effects upon the equitable rights and liabilities of the party charged thereby.
3. SALES—*Rights of Third Persons—Notice to Seller—Personal Liability.*—A purchaser who has notice of the rights of another and sells to a third person without giving notice to him, so as to place the subject of controversy beyond the reach of the right owner, becomes personally responsible for the demand.
4. TRUSTS AND TRUSTEES—*Purchaser—Notice of Trust.*—A purchaser with notice of a trust, either express or implied, becomes himself a trustee for the beneficiary with respect to the property and is bound in the same manner as the original trustee from whom he purchased.
5. CONDITIONAL SALES—*Reservation of Title or Lien—Enforcement Under Section 2462 of Code—Personal Judgment—When to Be Rendered.*—Section 2462 of the Code, as amended by the act of 1904, in relation to the reservation of title or liens on personal property and the method of enforcing the same, is a remedial statute and should be liberally construed so as to give effect to the legislative intent. The purpose of the amendment was to furnish a remedy co-extensive with any case that might fall within its purview or influence. Under the provision authorizing the court to hear and determine all questions arising out of or under the contract, which are properly raised by the pleadings, and to "render such judgment thereon as may be required by

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the rules of law or equity applicable to such questions," the court has the power and it is its duty to render personal judgments against parties before it who, by reason of their wrongful dealings with the property, have put it beyond the reach of the seller, and have rendered themselves personally liable for the value of the property or the amount of the lien thereon.

Error to a judgment of the Corporation Court of the city of Buena Vista in a proceeding by motion under section 2462 of the Code for the enforcement of the rights of the seller of personal property who had reserved title thereto. Judgment for the defendants. Plaintiff assigns error.

Reversed.

The opinion states the case.

Glasgow & White and *H. S. Rucker,* for the plaintiff in error.

Scott & Buchanan, for the defendants in error.

CARDWELL, J., delivered the opinion of the court.

The Liquid Carbonic Company, a corporation, in November, 1910, sold and delivered to L. B. Whitehead, a pharmacist doing business in the city of Buena Vista, a soda water fountain and fixtures for the price of $940.00, partly in cash and the residue in instalments of fixed amounts, to be paid at stated intervals; the title to the fountain being reserved to the vendor until the purchase money therefor was fully paid. The contract of sale was in writing signed by the parties, and a memorandum therefrom was produced February 24, 1911, in the office of the clerk of the corporation court of the city of Buena Vista and docketed in the "Retention of Title Book No. 1," a book provided and used for the docketing of conditional sales of personal property, as authorized by section 2462 of the Code of 1904, amended by act of 1904 (Acts of 1904, p. 96).

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Whitehead, on the 21st day of February, 1911, sold a one-half interest in his pharmacy, including the said soda fountain and fixtures, to one S. H. Yokeley, who thereby became a full partner with Whitehead, and this partnership was conducted by them under the name of the "Buena Vista Pharmacy" until August 15, 1911, when Yokeley sold out his interest in the business to one E. K. Morris. About the time of the sale by Yokeley to Morris, a corporation was chartered under the name of "The Whitehead Drug Company, Incorporated," to which the drug business was transferred, but at that time as well as at the time of the sale by Yokeley to Morris, the business had become a failure, and the parties theretofore conducting it totally insolvent.

On October 27, 1911, the Whitehead Drug Company had prepared by A. W. Robertson a deed of assignment to him as trustee, but for some reason this deed was never executed. Later, however, on November 18, 1911, another deed of assignment by said drug company of its assets was prepared by Robertson, to himself as trustee, which deed was duly executed, Whitehead and Morris uniting, delivered and recorded; whereupon Robertson, the trustee, took full and complete possession of the stock of drugs and fixtures conveyed to him, including the soda fountain. After considerable effort and continuing the business for several months, Robertson, trustee, sold out the entire business, including all the stock and fixtures and the soda fountain, at the gross price of $2,500, to one L. Blair, but did not receive this money from Blair. As we shall see later in this opinion, it very clearly appears that at the time of the sale by Robertson, trustee, to Blair the latter was fully informed of the claim and lien of the Liquid Carbonic Company on the soda fountain and agreed with the trustee to hold him harmless so far as this claim was concerned, and to "see that the claim was paid if the same was valid."

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In the meantime and before Blair bought said stock of drugs and fixtures, he had, for and on behalf of Yokeley, bought up all the claims against the Buena Vista Pharmacy, except the claim of the Liquid Carbonic Company; the Whitehead Drug Company not having contracted any debts. Yokeley, it appears, knew and admitted that he was liable as a partner for the debts outstanding against said Buena Vista Pharmacy, and employed Blair to buy up all of these claims at the lowest rate possible, and obligated himself to reimburse Blair the amount he had paid in buying up the claims, and gave to Blair a deed of trust on property good for such amounts as Blair had paid for him. So, it also appears that when Robertson, trustee, sold the stock of drugs and fixtures, including the soda fountain, to Blair, the money thus legally coming into Robertson's hands for the benefit of the creditors secured, was payable, except the debt of the Liquid Carbonic Company, to Yokeley. It further appears that the Liquid Carbonic Company was not preferred in the deed of assignment because Whitehead assumed that it already held title to and a lien on the soda fountain for the unpaid purchase money due thereon; hence, Robertson, trustee, required Blair to agree to save him harmless as to the claim of the Liquid Carbonic Company, the trustee presuming that Blair was buying up the claims upon the trust fund for himself, as he, the trustee, was not aware of the fact that Blair was buying them for Yokeley, and believing that Blair was buying them for himself he allowed Blair to retain the purchase price of the stock and fixtures and apply it to said claims as they were all owned by him, or supposed to be, when they were in fact owned by Yokeley, a real and actual debtor liable for said claims, as well as for the claim of the Liquid Carbonic Company, which latter claim was ignored in the deal with Blair.

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In this situation, the Liquid Carbonic Company made demand upon Robertson, trustee, for the balance due on its claim of title to and lien on the soda fountain amounting to $633.00, with interest to be paid out of the proceeds of the sale to Blair, but Blair declined to admit said claim as being prior in right to payment of the claims bought up by him for Yokeley, and, therefore, declined to pay over to the trustee a sufficient portion of the purchase price of the trust assets with which to discharge the claim of the Liquid Carbonic Company, and in the meantime Blair had resold the entire stock and fixtures, including the soda fountain, to H. H. Parker and J. T. L. Dickinson, who laid claim to them as purchasers without notice of the title and lien of the Liquid Carbonic Company. Thereupon the Liquid Carbonic Company filed its petition in this cause, naming as defendants thereto all of the above named parties, except Morris, the object of which was to enforce the reservation of title in the conditional sale contract above mentioned, and to get possession of the soda fountain; failing in that, for a personal judgment against A. W. Robertson, trustee, and in his own right, and against L. Blair, as well as against L. B. Whitehead and S. H. Yokeley, the original debtors to the petitioner for the purchase price of said soda fountain.

Upon the hearing of the cause on the pleadings, the demurrers of certain of the defendants to the petition were overruled, and thereupon, neither party requiring a jury, the whole matter of law and fact was submitted to the court for its decision, and the court having heard the evidence of witnesses and arguments of counsel adjudged as follows: "(1) That the contract in the petition mentioned was not docketed or recorded as required by law, and that the defendants, H. H. Parker and J. T. L. Dickinson, are complete purchasers for value and without notice of the plaintiff's claim or contract; (2) That under the

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facts proven . . . the plaintiff is not entitled in this proceeding to a personal judgment against the defendants, or any of them, for its alleged claim, or any part thereof. It is therefore considered by the court that the petition be dismissed . ." with costs to the defendants. "But this order shall be without prejudice to the plaintiff to prosecute its claim to a personal judgment or decree in other proper proceedings against the said defendants or any of them."

To said judgment the Liquid Carbonic Company applied for and obtained this writ of error.

It was practically agreed, and rightly, in the oral argument before this court, that the recent decision in the cases of *National Cash Register Co.* v. *Burrow,* 110 Va. 785, 67 S. E. 370, and *National Cash Register Co.* v. *Norfolk Realty Co.,* 110 Va. 791, 67 S. E. 372, rules this case as to the question, whether or not the conditional sale contract was docketed or recorded as required by law, and that by reason of certain omissions from the contract as docketed or recorded the lower court did not err in ruling that the contract in question had not been duly docketed or recorded as required by law. The trial court, taking the view that it had no jurisdiction in these proceedings to do more than determine in whom the title to the property (the soda fountain and its fixtures) was, did not rule upon the question whether or not Robertson, trustee, when the said deed of assignment was executed and delivered to him had actual notice of plaintiff in error's contract of conditional sale to Whitehead of the soda fountain, etc., retaining title and ownership to and in the same and communicated this notice to Blair when he sold and turned over to him (Blair) the entire business of the Whitehead Drug Company, including all the stock and fixtures and the soda fountain, etc., on May 7, 1912.

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In our view of the case it is necessary to determine this question of notice to Robertson, trustee, and Blair, before determining whether or not the trial court erred in ruling that it had no jurisdiction in this proceeding to do more than to ascertain in whom was the title to the property involved.

That a trustee in a deed of trust to secure creditors is a purchaser of value, is too well settled to require citation of authority. It is also true that if such trustee is, as in this case, charged with notice of a prior right to or lien upon the property conveyed to him, the burden of proof to show such notice is on the party alleging it. The fact of notice, however, may be inferred from circumstances as well as shown by direct evidence, but the proof must be such as to affect the conscience of the purchaser, and so strong and clear as to fix upon him the imputation of bad faith. *Arbuckle* v. *Gates & Brown,* 95 Va. 802, 30 S. E. 496, and authorities cited.

Tested by this rule, we have to reach the conclusion that the proof unmistakably fixes upon Robertson, trustee, as well as upon Blair, the purchaser of the trust assets, actual notice of the rights and claim of plaintiff in error with respect to the soda fountain and its fixtures. L. B. Whitehead, who directed the making of the deed of assignment to Robertson, trustee, when questioned as a witness in this cause as to whether the trustee, to whom he was making the assignment, had notice of the rights and claims of plaintiff in error, says: "Yes, sir, at the time that I called on Mr. Robertson for legal advice, I gave him full information that the Liquid Carbonic Company reserved a right in that fountain to the extent that they had in it the amount of money that was left unpaid." He further says: "The trustee knew they (Liquid Carbonic Company) had their lien on it, and the fact that he omitted it was to my mind indication that it was not necessary." The witness

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in this last statement was, of course, referring to the fact that the Liquid Carbonic Company was not preferred or mentioned in the deed of assignment. Witness also said: "I am absolutely sure that he (Robertson) was thoroughly familiar with it." (Claim of Liquid Carbonic Company.) Robertson, in his testimony, when inquired of as to notice to him of the rights of plaintiff in error with respect to the soda fountain, says: "From a deed that I prepared prior to the deed that was eventually executed, it would appear that I had knowledge that there was some lien on the soda fountain." He says further: "Well, I can't say just whether I even thought about it when we drew up the second deed, but it appears, as I said from the first, that I knew at the time that Whitehead did not own an absolute title to the soda fountain." Further on, when referring to certain language in the deed, witness says: "Now that language seems to indicate that Whitehead had told me something to the effect that he did not own the soda fountain in the clear, but it has been more than a year ago and my recollection is not distinct as to exactly what was said or done." Robertson does not deny that he had notice of plaintiff in error's rights when the deed of assignment was eventually executed," but only says in substance that he does not recollect whether or not he had in mind at the time what he admits that Whitehead had previously told him. When, however, he came to the negotiations of a sale of the trust property to Blair, he did have the matter in mind. To a question propounded by the court as to whether the claim on the soda fountain was not put in the deed "because it was supposed that there was a prior claim secured by the recordation of the vendor's lien," the witness answered: "At the time Mr. Blair purchased we discussed the matter of the lien. We knew then that the Liquid Carbonic Company claimed a balance, but Mr. Blair did not seem to think that their claim was legal. I

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did not know." When asked further as to his conversation with Blair, witness answered "Oh, yes, I told him he would have to make me safe in the matter; if he (Blair) could establish the fact that the Liquid Carbonic Company had no claim, it was all right with me, but he would have to make me safe."

Whatever may have been Robertson's recollection at the time of the trial as to what he recollected at the time of the transaction being inquired into, his whole course and dealing with the soda fountain while he had it in charge and up to the time that he sold it, eight months after the deed of assignment to him, showed that he did recollect the lien of plaintiff in error and that this knowledge was sufficient to affect his conscience. Accordingly, when Robertson came to consummate the sale to Blair, he required Blair to agree to save him harmless. Later Blair, it seems, did not recognize the binding force of his agreement to save Robertson harmless with respect to plaintiff in error's claim, and Robertson wrote him several letters insisting upon Blair's living up to his agreement, in which letters Robertson's statements clearly show that he, all through this transaction from his first interview with Whitehead to the sale to Blair, necessarily knew of the rights and claim of plaintiff in error with respect to the soda fountain. The fact is he relied on Blair "to save him harmless" as he had agreed, while Blair was relying upon defeating plaintiff in error's claim on the ground that it had not been duly docketed or recorded, overlooking the fact that if he had actual notice of this lien and the rights reserved to plaintiff in error thereby, the failure to properly docket and record the claim would not avail him.

"It is important to remember that actual notice and constructive notice, in any of its varieties, produce exactly the same effects upon the equitable rights and liabilities of the party charged thereby; the general rule under con-

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sideration equally includes both kinds within its operation." 2 Pom. Eq. Jur., sec. 690.

As before stated, Blair had actually bought up for Yokeley (who admitted in his testimony that he was liable for every dollar of it) the indebtedness of the Buena Vista Pharmacy and the Whitehead Drug Company, and Robertson, with full knowledge of the claim and rights of plaintiff in error, sold the entire trust assets under his control to Blair, who had like knowledge; and Blair sold the property to Parker and Dickinson at a price over $200 more than that he was to pay the trustee for it, withholding from them the knowledge which he possessed as to the rights of plaintiff in error, so that they (Parker and Dickinson) became purchasers for value and without such notice. The proof conclusively shows that the parties, other than Parker and Dickinson, purchasing the soda fountain and dealing with respect to it, had full actual knowledge of the claim and rights of plaintiff in error, and that in these circumstances Blair was permitted to retain the entire sum of the purchase money ($2,500), not only with knowledge of the rights of plaintiff in error in and to the soda fountain, but with the deliberate purpose of subsequently trying to defeat its claim. Whitehead and Yokeley were primarily liable for this debt and Robertson, trustee, and Blair having dealt with the soda fountain in the manner stated made themselves personally liable for the amount of plaintiff in error's claim with interest as asserted in the petition in these proceedings.

"A purchaser who has notice of the rights of another, and sells to a third person without giving notice thereof to him, so as to place the subject of controversy beyond the reach of the rightful owner becomes personally responsible for the demand." *Thompson* v. *Powell,* 5 Leigh (33 Va.) 576; *Hobson* v. *Whitlow,* 80 Va. 784.

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The learned author of Pom. Eq. Jur., *supra*, in section 688, under the headlines, "*Effects of Notice—Illustrations,*" says: "The third, and in its practical effects by far the most important, rule is that a party taking with notice of an equity takes subject to that equity. The full meaning of this most just rule is that the purchaser of an estate, legal or equitable, even for a valuable consideration, with notice of any existing equitable estate, interest, claim or right, in and to the same subject matter, held by a third person, is liable in equity to the same extent and in the same manner as the person from whom he made the purchase; his conscience is equally bound with that of his vendor, and he acquires only what his vendor can honestly transfer. The applications of this rule are as numerous as are the various kinds of equitable interests. . ." The first illustration given by the learned author is peculiarly applicable to the facts in the case at bar: "A purchaser with notice of a trust, either express or implied, becomes himself a trustee for the beneficiary with respect of the property, and is bound in the same manner as the original trustee from whom he purchased."

The remaining question here presented is, whether or not the lower court erred in its ruling that plaintiff in error was not entitled "in this proceeding to a personal judgment against the defendants, or any of them, for its alleged claim, or any part thereof."

Before the amendment to section 2462 of the Code of 1904, *supra,* the section did no more than simply provide for the reservation of title to chattels sold conditionally, without mention of any proceedings to enforce the same, and up to that time the parties were left to their remedy, either at law or in equity, as the nature of the case required. The statute as amended in 1904 (Acts 1904, p. 96) under which this proceeding was instituted, is a remedial statute and must be liberally construed to give effect

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to the legislative intent. It appears to us that the purpose of the amendment of the statute is to furnish a remedy co-extensive with any case that might fall within its purview or influence. No other words appear to be needed to enable the court to do full and complete justice to all concerned in a proceeding authorized by the statute. In sub-division one it sets forth that, "Every sale or contract for the sale of goods and chattels wherein the title thereof, or a lien thereon, is reserved until the same be paid for in whole or in part, or the transfer of title is made to depend on any condition, and possession be delivered to the vendee, shall, in respect to such reservation and condition, be void as to creditors of and purchasers for value without notice from such vendee unless such sale or contract be in writing, signed by both the vendor and vendee, in which the said reservation or condition is expressed, and until and except from the time that a memorandum of said writing setting forth the date thereof, the amount due thereon, when and how payable and a brief description of said goods or chattels, be docketed in the clerk's office of the circuit or corporation court of the county or corporation in which said goods or chattels may be."

Sub-division two provides that all reservations, liens, conditions, and the collection of all money mentioned in any such written contract, whether recorded or not, may be enforced on petition, etc. "A copy thereof shall be served on each person whose rights will be affected by the proceedings, which may be had thereon at least ten days before the date named therein for asking for judgment, and the original shall be filed with the justice or clerk of court at least ten days before such date.

"A defendant shall, when the case is in a circuit or corporation court, state the grounds of his defense or his counter claim or off-set in an answer to the petition, to which the plaintiff may reply, and no further pleading shall

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be required. But any such pleading may be demurred to as pleadings in other cases. The court or justice may permit all proper amendments to the petition or other pleadings. The court or justice shall hear and determine all questions arising out of or under the contract, which are properly raised by the pleadings (no pleadings other than the petition being necessary before a justice), and shall render such judgment thereon as may be required by the rules of law or equity applicable to such questions.

"The property may be sold, or possession delivered, or such other disposition made of it as the court or justice may direct. When the judgment is for money or costs or for the specific property, execution therefor may issue as in other cases. Where property is to be sold or other disposition made of it, the judgment or order of the court or justice shall be executed by the sheriff or other officer of the court authorized to execute process or by a constable."

There is no room for any other construction of the statute than that in a proceeding under it the court may and should render such judgment as the facts justify under the "rules of law and equity" applicable to the questions it is called upon to adjudicate. The chattel in this case had been, by the wrongful acts of the defendants, placed beyond the reach of its rightful owner to the extent that it had not been paid for, and, therefore, the only relief that could be given to the petitioner (plaintiff in error) in the proceeding was a personal judgment against the defendants, jointly and severally, whose wrongful dealings with the chattel in question had put it beyond the reach of the rightful owner thereof, or the mandate of the court, for the amount of purchase money due and owing on the chattel to the petitioner, with interest thereon from the 1st day of April, 1911, until paid, as alleged in its petition, and the costs of these proceedings.

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With the rights of the defendants *inter sese,* with respect to their wrongful dealings with the soda fountain in question, plaintiff in error is not concerned. It having alleged in its petition and proven the facts to which we have adverted, it could not by any reasonable construction of the statute have been relegated to another forum to prosecute its claim to a personal judgment or decree against these defendants.

It follows that the judgment of the trial court has to be reversed, and this court will enter the judgment which that court should have entered, viz.: that plaintiff in error recover of defendants in error, A. W. Robertson, as trustee and in his own right, L. Blair, L. B. Whitehead and S. H. Yokeley, jointly and severally, the sum of six hundred and thirty-three dollars ($633.00), with interest thereon from the 1st day of April, 1911, till paid, and the costs of this litigation.

Reversed.

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Syllabus.

Richmond

CITY OF LYNCHBURG v. COUNTY OF AMHERST.

November 20, 1913.

1. COUNTIES—*Bridge Outside County—Power to Purchase and Maintain—Special Act.*—While a county has no power to expend money on the maintenance of a bridge outside of its territorial limits, yet where a special act authorizes a county and a city to purchase a bridge connecting the two, and "to determine and fix the terms and conditions on which the bridge was to be used," an agreement between them for the purchase of the bridge, and to make it a free bridge, and fixing the terms and conditions on which repairs are to be made, is not beyond the powers of the county.
2. COUNTIES—*Bridge Outside County—Repairs—Agreement With Joint Owner—Expenditures Not Authorized—Power to Pay.*—A county and a city having entered into an agreement, pursuant to a special act of Assembly, that the expense of keeping in repair a connecting bridge shall be borne by them equally, but also providing that repairs in excess of $100.00 at any one time shall be made as may from time to time be agreed on by the county and city, the county is not bound for repairs in excess of $100.00 at any one time made by the city without the consent and approval of the county. The county had no authority to expend any money on the bridge outside its territorial limits, except as conferred by the special act of Assembly and the agreement made in pursuance thereof, and its representatives are not only under no obligation to pay any part of the expense of repairs paid by the city not authorized by said agreement, but they have no authority to pay the same or any part thereof.
3. COUNTIES—*Bridge Connecting City—Watchman—Ratification of Previous Appointment—Case at Bar.*—A county having agreed to pay one-half of the expenses of a watchman for a bridge connecting the county with an adjacent city, if it shall be deemed necessary by the council of the city to employ a watchman, the necessity for the employment of the watchman must be determined by the council before his employment. A resolution of the council passed years after the expense had been

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incurred is not sufficient. The fact that members of the council knew that the watchman was being employed is immaterial. A city council can only act at authorized meetings duly held, and not separately and individually.

4. INTEREST—*Liability For—Private Persons—State—Counties.*—As a rule the common law did not imply a promise to pay interest, and interest could not be recovered save where it was expressly contracted for; and, while a different rule prevails in this State as between natural persons and private corporations, it has not been extended to claims against the State or a county where there is no provision in the statute or authorized agreement creating the liability for the payment of interest. Claims disallowed by the supervisors of a county do not bear interest in the absence of some authorized agreement for its payment.

5. JOINT PROPERTY—*Powers Over—Private Persons—Cities—Counties.*—There is marked difference between the rights and duties of natural persons in respect to their joint property and the rights and duties which exist between a city and a county as to their joint property. Natural persons can do anything in respect to their common property not forbidden expressly or impliedly by law. In the case of a city and a county in reference to their joint property, the powers possessed and the duties imposed are all statutory. They are only such as are expressly provided by the statutes or necessarily implied, and this is especially true with reference to a county which is a mere sub-division of the State.

Error to a judgment of the Circuit Court of Amherst county on an appeal from an order of the board of supervisors of said county. Judgment for the defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

N. C. Manson, Jr., for the plaintiff in error.

Whitehead & Whitehead, O. L. Evans and *Aubrey E. Strode*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

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By an act of the General Assembly, approved January 14, 1882 (Acts 1881-2, pages 15-16), the city of Lynchburg and the county of Amherst were authorized to purchase a toll bridge across James river at Lynchburg, and "to determine and fix the amount of purchase money to be paid by each of them, and the terms and conditions upon which the bridge was to be used." The bridge was purchased at the price of $25,000, the city and county each paying one-half the purchase price. By the agreement between them under which the purchase was made, it was provided that the bridge and franchises should be held by them as joint owners, each being seized of an undivided moiety thereof. It was further provided:

"2nd. The expense of keeping said bridge in good repair shall be borne equally by the parties of the second and third parts in the following manner; that is to say, all repairs to the said property, as and when the same shall become necessary, provided the same shall not exceed the cost of one hundred dollars at any one time, shall be made by the city of Lynchburg and under the superintendence of its proper officers, and be, in the first instance, paid by the said city; and the county of Amherst shall and will repay to the said city, without delay, one-half of such expenses upon the same being certified to the board of supervisors by direction of the council of said city, and the said city shall have the power to rent out the toll house and store or stall adjoining the same, collect the rents and apply them to the expense of keeping the said property in repair as aforesaid, and will account for all such rents so collected, or which by due diligence might have been so collected, in the accounts of expenses and repairs so above provided to be rendered and certified.

"3rd. If it shall be deemed necessary by the council of said city for the safety and preservation of the said joint property to appoint or employ a watchman, the

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amount of salary or compensation paid or furnished him shall enter into and be a part of the accounts so to be certified and settled.

"4th. Repairs exceeding a cost of $100.00 at any one time shall be made as may from time to time be agreed on by the council of said city and the board of supervisors of said county."

About the year 1908 differences arose between the city and the county as to certain claims presented by the city to the board of supervisors of the county for payment for money paid by the city. The claims presented by the city aggregated $2,716.27 and were made up of items for repairs costing over $100 at one time, and for services of a watchman at the bridge. The board of supervisors refused to allow as proper charges against the county either of the claims.

The county insists that this action was proper because the agreement between the city and county, so far as it provided for repairing and guarding the bridge by the county, was *ultra vires* and void.

It is true, as argued by the counsel of the county, that the bridge is almost entirely within the city of Lynchburg, and that under the general law the county did not have the right to expend money in caring for and guarding such a bridge outside of its territorial limits. But it is equally true that under the general law the county did not have the power to unite with the city in purchasing the bridge. The same special act which authorized the city and county to make the purchase also authorized them "to determine and fix the terms and conditions on which the bridge was to be used." It is conceded that the county was acting within the power conferred by the act of Assembly in purchasing and making the bridge a free bridge. It seems to us clear that when they purchased the bridge and did away with the tolls by which it was kept up they had the

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right under their authority "to determine and fix the terms and conditions on which the bridge was to be used"—to agree how the bridge was to be kept in condition for use and in what manner the expenses therefor were to be incurred and paid. The act of Assembly was their only authority for its purchase, and by the agreement which it authorized them to make their rights in the property and their duties and obligations to each other in reference to it were to be, and were, fixed. The general law neither authorized its purchase nor provided how property acquired in that way was to be cared for by them.

We are of opinion that the agreement between the city and county for caring for the bridge was not *ultra vires*.

It is conceded by the county that if this be so the county is liable for the claim of $181.16 asserted by the city for repairs to the bridge costing $100 and under at one time, and that the trial court did not err in so holding. The county denies its liability for the other two claims asserted by the city upon the further ground that they were incurred in violation of the terms of the contract between it and the city. By that agreement repairs exceeding a cost of $100 at any one time were to be made "as may from time to time be agreed upon by the council of the city and the board of supervisors of the county." It appears that the cost of repairs made by the city, at a cost of more than $100 at a time, aggregate $2,885.48 (one-half of which it claims the county should pay), and were never agreed upon by the city council and the board of supervisors either before or after they were made. Indeed, more than half of that sum was expended by the city without even notice to the county that it was to be expended.

It is true, as argued by counsel of the city, that the agreement provided that the expense of keeping the bridge in repair should be borne equally by them, but the agreement further provided that the expenditures for that pur-

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pose should be made in the manner set out therein. The city had the right to make repairs costing $100 and less at any one time without the consent of the county, and the county, as we have seen, was bound to pay one-half the expenses of such repairs. But the city, under the contract, had no right to make any repairs which cost more than $100 at any one time unless such repairs were agreed to by the county. The county had not only not agreed to the expenditures for this item of repair, but gave as an additional reason for refusing to pay the claim when presented that the bridge was beyond repair, and that it was injudicious to expend sums upon it in excess of $100 at any one time.

The court, at the instance of the county, gave the following instructions:

"(1) No recovery can be had by the city against the county for any item in the accounts sued upon covering expenditures in excess of one hundred dollars at any one time for repairs not agreed to by the board of supervisors of the county."

"(5) The city had no right to repair and charge the county for one-half thereof after the board of supervisors of the county had declared that the bridge was beyond repair and declined to contribute to further repairs, except as to expenditures for repairs not exceeding one hundred dollars at one time."

These instructions correctly stated the law, in our view, and the court did not err in giving them. Nor did it err in refusing to give instructions Nos. 4 and 5 offered by the city, which were based upon the theory that although the county had not agreed to such expenditures for repairs, yet, if they were necessary for the use and preservation of the bridge, or the county had notice that such expenditues were going to be made, it would be liable. The board of supervisors, under the general law, had no authority

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to expend money upon property so acquired lying outside the county. Having no authority to expend money upon the bridge except by virtue of the agreement, and the repairs made by the city not having been made in accordance therewith, the county was not only under no obligation, but had no authority to pay any part thereof; for its authority and that of its representative, the board of supervisors, is derived solely from statute, and neither has any power other than those expressly conferred or necessarily implied. *Roper* v. *McWharter,* 77 Va. 214; *Supervisors* v. *Powell,* 95 Va. 635, 29 S. E. 682; *County of Alleghany* v. *Parrish,* 93 Va. 621, 25 S. E. 882.

As to the claim for the services of a watchman at the bridge: Upon this question the court, upon the motion of the plaintiff, gave the following instruction:

2. "The court instructs the jury that if they believe from the evidence that the payment of watchman's services was submitted to the council by the engineer and that the employment of the watchman and his payment was subsequently approved by the council, then they must find for the city as to one-half of the amounts paid by the city for watchman's services."

The contract provides that if it should be deemed necessary by the city council for the safety and preservation of the bridge to employ a watchman, the county was to pay one-half of his compensation. It is not shown that the members of the council, in session, ever considered the question of employing a watchman for the bridge until February, 1912, after this action had been instituted, when the council, in meeting, by resolution declared that a watchman was deemed necessary for the safety of the bridge, and ratified and confirmed the employment of a watchman since November 1, 1906.

It is argued by the counsel of the city that if the employment of a watchman was in fact necessary, the question

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of whether or not his employment was deemed necessary by the council was an unimportant detail, and that the county was in no manner prejudiced by the failure of the council to pass a formal resolution to that effect before he was employed, especially as the members of the council from the reports made by the city officials from year to year were fully informed that payments were being made for a watchman's services, and, therefore, they must have deemed his employment necessary, since no objection was made by them to such payments.

What the members of the council knew individually, or may have said or done separately, can have no bearing upon the question under consideration. Whether or not a watchman was necessary was to be determined, under the contract, by the council of the city, and nothing is better settled than that a city council can only act at authorized meetings duly held and not separately and individually. 2 Dillon on Mun. Corp. (3rd ed.), section 501.

Under the agreement between the city and county the latter has no voice in passing upon the question whether or not a watchman is necessary. The determination of that question is left solely to the city council, and its judgment is conclusive upon the county. This being so, it was clearly the duty of the council to ascertain whether or not a watchman was necessary before he was employed. Its declaration years afterwards, and after the cost of employing him had been incurred and would have to be borne entirely by the city unless it could declare that it deemed the watchman's employment necessary, was not such an expression of opinion by the council as the county under its contract was entitled to have.

It follows from what has been said in discussing this question that the instruction given by the court was erroneous.

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The city also assigns as error the refusal of the court to instruct the jury that items of account sued for, which they found in favor of the city, must bear interest from the date such items were rejected by the board of supervisors of the county.

As a rule, the common law did not imply a promise to pay interest, and interest could not be recovered, save where it was expressly contracted for. 4 Minor's Inst. (1st ed.) 738, and authorities cited. While the courts in this State, aided by the legislature, have established a different doctrine as between natural persons and private corporations, viz., that it is but natural justice that he who has the use of another's money should pay interest on it (4 Minor's Inst. 738, and cases cited), yet, so far as we know, it has never been held by this court that a claim asserted against the State or a county bears interest where there is no provision in the statute or authorized agreement creating the liability for the payment of interest. Not only is there no statute or precedent for the payment of interest on claims like those asserted in this case, but clause 2, section 834 of Pollard's Code, which provides for the examination, settlement and allowance of all accounts chargeable against the county and for the issuance of warrants therefor when settled and allowed, expressly declares that no interest shall be paid by any county on any county warrant. If the board of supervisors had allowed the claims of the city, or any of them, and issued a warrant therefor, and the county afterwards refused to pay the claim and litigated its liability, as it had the right to do (Code, section 843), and judgment had been rendered against it for the amount of the warrant so issued, by the plain terms of the statute, it would not have been chargeable with interest. This being so, it is difficult to see upon what ground the county would be liable for in-

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terest on the same claims when disallowed by the board of supervisors. The instruction was properly refused.

The counsel of the city, in his written and oral arguments, insisted, as we understood him, that, as the city and county were joint owners of the bridge, their rights and obligations should be determined upon the same principles as if they were natural persons who were joint tenants or tenants in common.

There is a marked difference between the rights and duties of natural persons in regard to their joint property and the rights and duties which exist between a city (a municipal corporation) and a county (a *quasi* corporation) as to their joint property. In the case of natural persons, they can do anything expressly or impliedly in reference to the common property not forbidden by law. In the case of a city and a county, in reference to their joint property, the powers possessed and the duties imposed are all statutory. They are, as we have seen, only such as are expressly provided by the statutes or necessarily implied, and especially is this so with reference to a county which is a mere subdivision of the State.

The judgment complained of must be reversed for the error of the trial court in giving instruction No. 2, asked for by the plaintiff city, the verdict of the jury set aside and the cause remanded for a new trial not in conflict with the views expressed in this opinion.

Reversed.

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Richmond

McCAULEY AND OTHERS v. GRIM AND OTHERS.

November 20, 1913.

1. DEEDS—*Acknowledgment—Judicial Act—Impeachment.*—Taking and certifying the acknowledgment of a deed is regarded as a judicial act in this State, and hence the certifying officer's determination of the matters involved has the conclusive force and effect of a judgment and imports absolute verity, and cannot be collaterally attacked. It cannot be impeached even directly, save in a court of equity, and not then except for fraud.
2. JUDGMENTS—*Res Judicata.*—Where one was a party to another litigation in which his title to a tract of land was put in issue and decided against him, the matter as to him is *res judicata.*
3. INFANCY—*Revocation of Deed—Proof Required.*—Where the grantor in a deed was, at the date of the deed, on the border line of his majority and acted as an adult, making his own bargain and receiving his share of the purchase money, the evidence of his infancy at that time should be clear and satisfactory to justify a court in depriving an innocent purchaser for value and without notice of land of which he and his predecessors in title had been in undisputed possession for thirty-odd years without any intimation of an adverse claim, though the claimant lived in the neighborhood.
4. DEEDS—*Possession—Presumption of Grant—Evidence.*—Where the origin of the possession is not accounted for, and would be unlawful unless there had been a grant, length of possession is *prima facie* evidence, but only *prima facie*, from which a jury might or might not have presumed a conveyance.
5. LIMITATION OF ACTIONS—*Life Estate—Fee-Simple—Merger—When Statute Begins to Run.*—Possession under a claim of title for a period of fifteen years ripens into a perfect title as well against a life tenant as against others, and if such possessor also has title to the remainder in fee, the fee merges the lesser estate, and the statute of limitations against one claiming an interest as a remainderman begins to run from the time of the merger, and not from the death of the life tenant.

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Appeal from a decree of the Circuit Court of Rockingham county. Decree for some of the defendants. Complainants appeal.

Affirmed.

The opinion states the case.

Chas A. Hammer and *Rudolph Bumgardner,* for the appellants.

Conrad & Conrad and *Sipe & Harris,* for the appellees.

Whittle, J., delivered the opinion of the court.

Appellant, Amanda C. McCauley, filed her bill at the May term, 1911, of the circuit court of Rockingham county against the appellees, Deihl and Baugher and wife, and others, for partition of 120 acres of land situated on Shenandoah river, in that county.

Plaintiff asserts title to an undivided share in the land as one of the heirs of her mother, Elizabeth Grim, who intermarried with her father, Thomas Becks. The bill contains no specific denial that the plaintiff united with her husband and brothers and sisters in the deed of August 20, 1869, conveying the land in controversy to Polly Eutsler, Benjamin Rice and Jacob Grim, under whom the present owners claim, but contents herself with the allegation that the parties referred to executed the deed, and exhibits what purports to be a copy, presumably for the purpose of showing that she was not a party to the instrument. During the progress of the case, however, the original deed was put in evidence, from which the plaintiff's name appears as one of the grantors.

Appellees demurred to the bill and filed answers in which they averred that the deed was duly executed by the plaintiff and acknowledged before two justices, whose

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certificate showed that, on being examined by them privily and apart from her husband, and having the writing fully explained to her, she acknowledged it to be her act, and declared that she had willingly executed the same and did not wish to retract it—that being the form of certificate required by statute at that time. The present owners also alleged that they were innocent purchasers of the land for value and without notice of plaintiff's claim, and Deihl proved that he had erected permanent improvements upon his part of the tract, at a cost of upwards of $3,000.

Though, as observed, no such case is expressly made by the bill, the plaintiff, over the objection of the defendants, sought to prove by parol evidence that she neither executed nor acknowledged the deed. Among other witnesses introduced for that purpose, one of the justices was relied on to impeach his own certificate. His deposition was taken thirty-seven years after the date of the deed, and after the death of his associate.

It is settled law in this State that taking and certifying acknowledgments to a deed is a judicial act, and, therefore, the certifying officer's determination of the matters involved has the conclusive force and effect of a judgment and imports absolute verity, and cannot be collaterally attacked.

"It cannot . . . be impeached, even directly, save in a court of equity, and not then except for fraud." 2 Minor on Real Property, section 1398. *Carper* v. *McDowell*, 5 Gratt. (46 Va.) 212, is a leading case in Virginia on the subject. Judge Baldwin, in his opinion, emphasizes the importance of giving conclusive effect to such certificates, and says: "It follows from the nature and purposes of such a jurisdiction (probate jurisdiction) that, though its proceedings are often and most generally *ex parte*, yet that, when perfected, they are evidence for and against the whole world; that they cannot be impeached by extrinsic

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evidence in collateral controversies concerning the rights to property, and that, as a general rule, they cannot be so impeached, even directly, in a suit instituted for the very purpose. If this were otherwise, the obvious result would be to defeat, in a great measure, the object of the probate jurisdiction, and to introduce much uncertainty and confusion into the administration of justice."

In *Building Association* v. *Graves,* 96 Va. 138, at page 140, 31 S. E. 23, Judge Buchanan, at page 140, remarks: "The object of the registry laws is to secure titles and to prevent frauds. The certificate of acknowledgment is required to perfect the deed for recordation. As the record, when made, is constructive notice to all the world, public policy requires that it should import as near absolute verity as is consistent with a due regard to the rights of the parties interested. It would open the door to great abuses and gross frauds to make the validity of the registration of a deed depend upon the recollection or the subsequent conduct of the party who took the acknowledgment." *Bank* v. *Paul,* 75 Va. 594, 40 Am St. Rep. 740; *Murrell* v. *Diggs,* 84 Va. 900, 6 S. E. 461, 10 Am. St. Rep. 893.

The present case furnishes an apt illustration of the mischievous consequences that would result from the relaxation of the rule which forbids that such certificates shall be drawn in question by parol evidence in collateral proceedings. The bill wholly fails to advise the defendants of the real ground upon which the plaintiff rests her case. The suit was brought forty-two years after the date of the deed, and the evidence chiefly relied on to sustain plaintiff's contention is furnished by the depositions of herself and husband and one of the certifying justices, who was seventy-nine years old when he gave his deposition, and was testifying to a transaction which occurred thirty-seven years before; and, besides, the developments in the case strongly tend to discredit him as a witness.

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Plaintiff lived in the immediate vicinity of the land, and stood by and saw an innocent purchaser making valuable improvements thereon, without the slightest intimation of her purpose to claim a share in the estate until she brought her suit. She seeks to excuse her conduct and long delay on the plea that she is a married woman, and also that her father, Thomas Beck, was tenant by the curtesy of the land, and that she filed her bill within four years after the life estate fell in. The common law disabilities of married women with respect to their property rights have in large measure been removed by statute, and, in a court of conscience at least, their moral responsibilities of ownership should be proportionately increased. The effect of the alleged intervention of Thomas Becks' life estate will be considered in connection with Isaac T. Becks' petition.

Our conclusion upon this branch of the case is that the plaintiff is not entitled to relief, either upon the pleadings or evidence, and that her bill was properly dismissed.

Elizabeth F. Tate and Isaac T. Becks, two of the other heirs, both filed petitions in the main case. They admit that they conveyed their interest in the land to grantors of the appellees, the former by her separate deed and the latter by uniting in the deed of August 20, 1869; but they allege that they were infants when these conveyances were executed, and the object of their petitions is to repudiate their respective deeds on that ground and to have partition of the land.

With respect to the claim of Elizabeth F. Tate, the record shows that she was a party to another litigation in which her title to the land was put in issue, which issue was determined against her by the court and her petition dismissed, hence the matter as to her is *res adjudicata*.

The only direct evidence of Isaac Becks' age is furnished by his own deposition, supplemented by his unsworn statement made after the execution of the deed, upon which

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he obtained a marriage license. The family Bible, in which was registered the ages of himself and his brothers and sisters, is in the possession of the plaintiff, Mrs. McCauley, but the age register has been torn out and was missing, it is said, when she received the book from her father. Isaac, at the date of the deed, was on the border line of his majority and acted as an adult, making his own bargain and receiving his share of the purchase money. In such case it is no hardship to require that the proof of his infancy should be clear and satisfactory to justify a court in depriving an innocent purchaser for value and without notice of land of which he and his predecessors in title had been in undisputed possession for thirty-odd years without any intimation of an adverse claim, though the claimant lived in the neighborhood. In a somewhat analogous case this court recently held the proof of infancy insufficient. *Hurt* v. *Blankenship,* 112 Va. 574, 72 S. E. 117.

But the decision need not be rested alone upon that consideration. Assuming that petitioner's statement that he was twenty-one years old on February 16, 1871, is true, and also conceding that he had the right to disaffirm his deed at any time within fifteen years from that date (*Wilson* v. *Branch,* 77 Va. 65, 46 Am. St. Rep. 709; *Burch* v. *Linton,* 78 Va. 584, 49 Am. Rep. 381), nevertheless, upon that basis his right would have expired on February 16, 1886, and he did not file his petition until July 30, 1906, a period of more than twenty years after he became of age.

But he seeks to avoid the effect of that limitation on the theory that his father, as tenant by the curtesy, was entitled to a life estate in the land, and that his petition was filed within fifteen years after his death.

If that contention be sound as a general proposition, as to which we need express no opinion, it cannot prevail under the facts before us. The predecessors of the appel-

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lees took complete possession of the land at the date of their deed, on August 20, 1869, with the knowledge of all concerned, including the life tenant, Thomas Becks. The land was transferred to them on the land books for the ensuing year, and they and those claiming under them have continuously paid taxes thereon, and have remained in the open, adverse and undisputed possession until now. Thomas Becks never questioned their title or possession, and substantially declared that they were the rightful owners of the property. It is true no deed from him was produced, yet the court, under the circumstances, might well presume a conveyance.

"Where the origin of the possession is not accounted for, and would be unlawful unless there had been a grant, length of possession is *prima facie* evidence, but only *prima facie,* from which a jury might or might not have presumed a conveyance." 2 Minor on Real Property, section 1035.

The defendants' possession was unquestionably under *claim of title,* and after the lapse of fifteen years, to-wit, on August 20, 1884, it ripened into a perfect title. On that date their title was as complete as if they had held the life estate by deed from Thomas Becks. They already had title to the remainder in fee simple, and the two estates in the same land having become vested in the common owners, under the common law doctrine of merger, the lesser estate merged in the greater (1 Minor on Real Property, section 375), and the statute of limitations began to run against Isaac Becks at the time of the merger and not at the death of Thomas Becks. Upon this hypothesis his right to disaffirm expired August 20, 1899.

In every aspect of the case the decree of the circuit court is plainly right and must be affirmed.

Affirmed.

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Syllabus.

Richmond

MAY, GUARDIAN, v. SHERRARD'S LEGATEES.

November 20, 1913.

1. WILLS—*Legacies—Specific—Demonstrative.*—A specific legacy is a bequest of a specific article of the testator's estate, distinguished from all others of the same kind; for example, a particular horse, or piece of plate, or money in a certain purse, or chart, a particular stock in public funds, a particular bond or other instrument for the payment of money; whereas a demonstrative legacy is a bequest of a sum of money or of quantity or amount having a pecuniary value and measure, not in itself specific, but made *primarily* out of a designated particular fund or piece of property belonging, or assumed to belong, to the testator.
2. WILLS—*Specific Legacies—Ademption.*—As a general rule a legacy will not be construed as specific unless it appears clearly to have been so intended, and whether or not it is specific depends wholly upon the language of the will. Liability to ademption is said to be the most distinctive feature of a specific legacy.
3. WILLS—*Specific Devises and Bequests—Revocation—Case in Judgment.*—A devise of "my dwelling house and the lot on which it stands" . . "to be sold and equally divided between" two designated beneficiaries, is either a gift of the house and lot or it is a gift of the fund arising from the sale thereof. If it be a gift of the house and lot, it is manifestly a specific devise; if it is a gift of the fund arising from the sale directed, it is equally specific, and the subsequent alienation of the property by the testatrix worked a revocation if it was a devise, and an ademption if it was a bequest.
4. JUDGMENTS—*Stare Decisis—Old Cases—Weight Given.*—The fact that a case is old does not affect its value or authority, and where it appears to have been carefully considered and well supported by authority, and is in accord with modern decisions in other States, it should not be regarded as overruled by a subsequent case in conflict therewith which makes no reference to it, and in which the question decided does not appear to have been carefully considered.
5. WILLS—*Specific Legacy—Ademption—Intention of Testator.*—The fact that a testator states in the codicil to his will what he

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had done with land specifically devised by his will, and what disposition he had made of a portion of the proceeds thereof, does not affect the question of ademption. Ademption generally depends upon a rule of law and not upon the intention of the testator.

6. WILLS—*Construction—Intention of Testator—Change of Words.*—Where the testator's intention is manifest from the whole will and surrounding circumstances, but is endangered and obscured by inapt and inaccurate modes of expression, the language used will be subordinated to that intention, and, in order to give effect to such intention, one word may be substituted for another, but the right of the court to mould the language of a will by rejecting, supplying, transposing or substituting words exists only where the testator's intention is clear or manifest from the context and the surrounding circumstances.

7. WILLS—*Construction—Substitution of Words—Case in Judgment.*—A testatrix, by a codicil in her own handwriting, gave a $600 certificate of stock in a manufacturing company to certain designated legatees, and in the same clause uses the following language: "I have also $1,400 certificate at Clover S. C. Manfc. Co., M. L. Smith, Treas., put there the 11th of April, 1910, and no interest as yet drawn at 7 *per cent.* See that it is drawn by check. That I wish to go to." Both certificates were claimed by the same legatees, who insisted that the final word "to" in the sentence quoted should be construed and treated as intended for the adverb "too," but it is held that this could not be done, and that the $1,400 certificate passed under the residuary clause of the will.

Appeal from a decree of the Corporation Court of the city of Staunton, in a suit brought by an executor for the construction of the will of his testatrix.

Affirmed.

The opinion states the case.

Quarles & Pilson, for the appellants.

Timberlake & Nelson, Robertson & Robertson and *W. H. Landes,* for the appellees.

BUCHANAN, J., delivered the opinion of the court.

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The principal object of this suit, which was brought by the executor of the last will and testament of Mrs. Maria L. Sherrard, was to have a construction of that instrument. The will is one of considerable length, containing twenty clauses and a codicil. The controversy here, however, is only as to the construction to be placed upon the second clause and a portion of the codicil. The provision of the second clause is as follows:

"Second. I give, bequeath and devise my dwelling house and the lot on which the same stands, situated on North New street, in the city of Staunton, Virginia, and now known by the street number of 307 North New street, to be sold and equally divided between Tate Boys Sterrett, of Hot Springs, Virginia, and John Bishop, of Charlestown, West Virginia, great-nephews of mine, and sons of Maria B. Sterrett, of Hot Springs, Virginia, and Margaret Bishop, of Charlestown, West Virginia.

The only other portions of the will which, it is claimed, throw any light upon the meaning to be given the clause quoted is contained in the fifth clause, which, after making certain bequests to Margaret Bishop, a great-niece of the testatrix, provides that "in the event of the death of her brother, John Bishop, I will one-half of the 307 North New street house, when sold, to pass in fee simple absolute to Margaret Bishop, of Charlestown, West Virginia"; and the codicil, which states, among other things, that the testatrix had sold the house No. 307 North New street for thirty-five hundred dollars and invested twenty-six hundred and fifty dollars thereof in two houses and lots in the city of Roanoke, which were worth three thousand dollars at the time the codicil was written. The trial court held that the devise or bequest made in the second clause was specific and not demonstrative, and that by the sale of house No. 307 mentioned therein in the lifetime of the testatrix the gift made by that clause was adeemed or

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revoked, and that the devisees or legatees named therein took nothing under it.

The distinction made between specific and demonstrative gifts is well understood, but it is sometimes difficult to determine whether a particular gift belongs to the one class or the other. Definitions of these two kinds of legacies are found in the decisions and text-books, varying somewhat in phraseology, but generally substantially the same in meaning.

Mr. Pomeroy, in his work on Equity Jurisprudence, which is relied on largely by the appellants to sustain their contention that the legacy in question is not specific, but demonstrative, defines a specific legacy as "a bequest of a specific article of the testator's estate, distinguished from all others of the same kind—as, for example, a particular horse, or piece of plate, or money in a certain purse, or chart, a particular stock in the public funds, a particular bond or other instrument for the payment of money." (Vol. 3 [3rd ed.] section 1130.) He defines demonstrative legacies as "bequests of sums of money, or of quantity or amounts having a pecuniary value and measure, not in themselves specific, but made payable *primarily* out of a particular designated fund or piece of property belonging or assumed to belong to the testator." (Same volume, section 1133.)

The general rule is that a legacy will not be construed as specific unless it appears clearly to have been so intended (*Corbin* v. *Mills*, 19 Gratt. [60 Va.] 438, 468), and that whether or not it is specific depends wholly upon the language of the will. 3 Pom. Eq. Jur., sec. 1130.

Tested by these definitions and rules of construction, to which class does the gift in question belong? The language of the second clause is: "I give, bequeath and devise my dwelling house and the lot on which the same stands" (describing it so that there could be no doubt about its location and identity), "to be sold and equally divided be-

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tween" the beneficiaries named. Whether this be a gift of the house and lot itself, and the sale directed was merely for the purposes of partition between the devisees, as the appellee insists, or a gift of the proceeds or fund arising from the sale of the house and lot, there can be no question that the thing given is so described, pointed out and identified as to distinguish it from all the other property of the testatrix. It is not a gift of a certain sum of money or other thing "payable primarily out of a particular designated fund or piece of property." There is nothing in the language of the clause or of the will which manifests any intent to give the persons named in that clause any particular sum, or amount, or quantity, to be paid primarily out of the proceeds of the sale of the house and lot, and if for any reason that fund should fail, then to be paid out of the general estate; but, on the contrary, the gift is either of the house and lot or it is a gift of the fund arising from the sale. If it be a gift of the house and lot, it is manifestly a specific devise; if it is a gift of the fund arising from the sale directed, it is equally specific as it seems to us. That the testatrix intended the gift made by that clause as specific, either of the house and lot or of the fund produced by its sale, is emphasized and made clearer, if possible, by the fifth clause of her will, which provides "that in the event of the death of her brother, John Bishop" (one of the beneficiaries under the second clause), "I will one-half of 307 North New street house, when sold, to pass in fee simple to Margaret Bishop. . . ."

The conclusion that we have reached, that the gift in question is specific and not demonstrative, is fully sustained by the case of *King* v. *Sheffey*, 8 Leigh (35 Va.) 614, in which the provision of the will construed was substantially the same as that now under consideration. In that case the testator, after having given to his wife one-

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third of the rents and profits of his Fincastle property for life, devised and bequeathed to the children of his son and daughter, Conally and Nancy Finley, "one-half of my personal property in the county of Washington aforesaid; also, two-fifths part of the net proceeds of my estate in Fincastle aforesaid, which is to be sold at my beloved wife's death, at the discretion of my executors." He then gives two other fifths of the Fincastle property to Mitchell and wife and the remaining one-fifth to Allen and wife. The testator's estate in Fincastle consisted of several houses and lots, which he sold within less than a year before his death upon one, two, three and four years' credit, and he was the owner of the purchase money bonds at the time of his death. The question in that case was whether or not the devise or bequest of the Fincastle estate or its proceeds was revoked or adeemed by the alienation of the testator in his lifetime. President Tucker, in delivering the opinion of the court, said, among other things: "It seems to have been assumed by the counsel for the appellee that these devises of the proceeds of the Fincastle estate were to be considered as legacies, but it was very properly admitted that as legacies they came within the description of specific legacies. And if they are legacies at all in the strict sense of the term, they are strictly specific and are not of that class of legacies of money or quantity which are said to be only in the nature of specific legacies, and which, if the fund be called in or fail, will be paid out of the general estate. 1 Roper on Legacies, 169. For here it is clear that the testator had no design that his general estate should ever be charged with those legacies. . . . Moreover, it was not a bequest of a certain sum (as of five hundred dollars) chargeable upon the land, which, according to the case of *Fowler* v. *Willoughby*, 2 Sim. & Stuart 354, might be charged on the general assets if the land failed, but it was a devise of

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an uncertain interest, which would be more or less, according to the prices for which the land might sell, the amount of which did not admit of being ascertained except by sale."

After holding that if the gifts in that case were treated as legacies they were specific and were adeemed by the alienation of the Fincastle estate by the testator, he continues: "To come to a just understanding of this case, however, we must consider it more closely. This is a case of a devise, and a devise of real estate." After giving the reasons why the claim in question was a will of real estate and citing authorities to sustain that view, he says: "So completely, indeed, is it a devise of the land to the three beneficiaries that if it had not been sold Finley, Mitchell and Allen might now by their concurrent act demand a conveyance of the land itself and arrest the sale; for a right to the whole proceeds of the estate is a right to the estate itself." After citing authorities to sustain that view, he says: "The devise, then, being of real estate—that is, of an equitable interest in land—was revoked by alienation. This principle is too plain to require support."

An attempt is made to distinguish that case from this in this—that in the one the property to be sold is specifically designated, and in the other it is not. The fact that the testator in *King* v. *Sheffey, supra,* did not name or designate each house and lot which he directed to be sold, but described them as his "Fincastle estate," whereas in this case the property is specifically designated and described, does not affect the question under consideration, for the property was as fully identified in the one case as in the other. It is also insisted that *King* v. *Sheffey* is contrary to the weight of authority in other jurisdictions, is a very old case and has never been cited or relied on by this court, and is in conflict with *Myers* v. *Myers,* 88 Va. 131, 13 S. E. 346.

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If the gift in this case be treated as a devise of real estate, the whole current of authority is that it was revoked by the alienation of the house and lot by the testatrix. If it be regarded as a bequest or legacy, then the weight of authority is, it seems, in favor of the conclusion reached by this court in *King* v. *Sheffey*. The text-books generally, as we understand them, so state the rule, and the decided cases sustain that statement.

In discussing the subject of specific legacies, Mr. Roper in his work (4 Am. ed., p. 200) says that "if a testator direct his freehold or his leasehold estates to be sold and dispose of the proceeds in such a form as to evince an intention to bequeath them specifically, the testamentary disposition will be specific, the money is sufficiently identified and severed from his other property, and since he has sufficiently marked his intent to distribute the identical proceeds, the bequests are accompanied with all the requisites of specific legacies." Citing *Page* v. *Leafingwell*, 18 Vesey 463.

In a note to 3 Pom. Eq. Jur., sec. 1130, at p. 2210, it is said that "where the testator deals with specific property belonging to himself, not by giving legacies or sums of money out of it, but by dividing and apportioning out the very property itself, or the proceeds of it, if it is directed to be sold and converted into money, then the bequests of the parts thus apportioned among the legatees will be specific." Citing *Page* v. *Leafingwell* and other English cases.

In Redfield on Wills it is said: "A distinction is made between legacies out of the issues of real estate, whether resulting from sale or otherwise, and legacies merely chargeable upon real estate. In the former case it has been regarded the same in effect as a devise of a specific proportion of real estate, and consequently as creating a

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specific devise, the same as if a portion of the real estate itself had been devised." 2 Redfield on Wills, p. 145.

In 18 Am. and Eng. Enc. Law. (2nd ed), p. 716, it is said: "A gift of a specific thing to be sold and divided in certain shares among several persons is a specific bequest." Also note 4, page 720. See also note to the case of *Weed* v. *Hoge, &c.,* 28 Am. and Eng. Cases Ann. 543, 546, &c., where numerous cases are cited. In the case to which that note is appended it was held that a will directing the executors to sell the testatrix's property situated in the State, and to give a specified part of the proceeds to her husband absolutely, creates a specific legacy. It lays down the rule as general, that "a gift of the proceeds of the sale of specific real estate or chattels is specific."

It is true, as contended, that *King* v. *Sheffey, supra,* is an old case, and that it has never been cited by this court, so far as we know. The fact that it is old does not affect its value or authority; that it has not been cited may be because our reports do not contain many cases involving the question of the distinction between specific and demonstrative legacies, and none which involve the precise question involved in that case and in this, unless it be the case of *Myers* v. *Myers,* 88 Va. 131. That case makes no reference to *King* v. *Sheffey,* though the opinion seems to be in conflict with the decision in that case. The opinion in *Myers* v. *Myers* shows on its face that the question, whether or not the gift in that case was specific or demonstrative, was not very fully considered, and it can hardly be supposed that it was intended in that case to overrule *King* v. *Sheffey* without even referring to it, its reasoning or the authorities upon which it was rested—a case in which the opinion was rendered by President Tucker, one of the most distinguished jurists that ever sat on this bench, and concurred in by all the other members of the court—Cabell, Carr, Brokenbrough and Brooke.

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The conclusion in *King* v. *Sheffey,* that the gift in that case was specific whether treated as a devise of real estate or a bequest of the proceeds of its sale, seems to us to draw the true distinction between specific and demonstrative gifts by will, and is in accord with the weight of authority, and should not be regarded as having been overruled by a subsequent case which makes no reference to it, and in which the question does not appear to have been carefully considered. There is nothing in our other cases referred to, as we understand them, which is not in harmony with the principles announced in *King* v. *Sheffey.*

Having reached the conclusion that the gift in question was specific, it follows that the appellants can take nothing under the second clause of the will, whether the gift be treated as a devise or a bequest, for the alienation of the property by the testatrix worked a revocation if it was a devise and an ademption if it was a bequest. Liability to ademption is said to be the most distinctive feature of a specific legacy.

In *Hood* v. *Haden,* 82 Va. 588, 599, it was held that if the identical thing bequeathed was not in existence, or had been disposed of by the testator, so that it does not form a part of the testator's estate at the time of his death, the legacy is extinguished and the legatee's rights are gone.

In *Skipwith* v. *Cabell,* 19 Gratt. (60 Va.) 758, in which one of the questions was whether or not certain stock given had been adeemed, it was held that a mere nominal or formal change in the thing given did not work an ademption. In that case the gift was of "my guaranteed bonds of the James River and Kanawha Company, to be equally divided between" the beneficiaries. After the date of the will an act was passed which authorized the holders of the bonds of that company, for which the State was bound, to surrender them and receive in lieu thereof bonds of the State for the same amount, and under this act the tes-

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tatrix exchanged her guaranteed bonds for State bonds, which she held at her death. While it was held in that case that there was no ademption, it was upon the ground that the thing given had been changed in name and form only and was substantially the same; but Judge Joynes recognizes fully the general rule that where the thing given is not in existence or has been alienated the bequest is adeemed. He says: "Where stock specifically bequeathed has been sold by the testator . . . the subject of the bequest is extinguished or annihilated—nothing exists upon which the will can operate and the legacy is adeemed and gone, but where the thing specifically given has been changed in name and form only and is in existence substantially the same, though in a different shape, it will not be adeemed by such nominal change." Page 795.

There are cases in other jurisdictions which hold that the sale or disposition by the testator in his lifetime of the thing given does not always work an ademption, but they are contrary to the general rule (see 3 Pom. Eq. Jur., sec. 1131, and notes 2 and 3; *Slater* v. *Slater,* 8 Am. and Eng. Ann. Cases 141, and note, p. 144, &c., and cases mentioned), and to the doctrine of our own decisions. In *King* v. *Sheffey, supra,* the purchase money bonds of the property directed to be sold and the proceeds divided between the beneficiaries belonged to the estate, and yet, treating them as legacies, it was held that they were adeemed. This case is a stronger one for the ademption of the bequest than that, since in this case not only was the house and lot, given and directed to be sold and its proceeds divided, sold during the lifetime of the testatrix, but the proceeds in part were invested in other real estate and the residue of the proceeds otherwise used or disposed of.

The fact that the testatrix states in the codicil to her will what she had done with the Staunton property and

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the disposition she had made of a portion of the proceeds does not affect the question of ademption. Ademption with us, and generally, depends upon a rule of law and not upon the intention of the testator. *King* v. *Sheffey*, *supra*, 617; *Skipwith* v. *Cabell*, *supra*, 794-5; 1 Roper on Legacies, 329.

The remaining question to be considered is whether or not the fourteen hundred dollar certificate of stock mentioned in the codicil was bequeathed to the appellants, Tate Boys Sterrett and John Bishop.

So much of the codicil as bears upon this question is in the following language: "Since, then, I have a $600 certificate, Clover Manufacturing Company, Clover, S. C., invested May 10, 1910, at 7 *per cent.* Mr. M. L. Smith, treasurer, invested it. I wish that to be collected and equally divided with Tate Boys Sterrett, of Hot Springs, Va., Bath county, son of Tate Sterrett and Maria Boys Sterrett, niece of mine. The other one-half of property I mention to go to John Bishop, of Hagerstown, Md., son of Mrs. Margaret Smith now and mother of John Bishop, my niece's son, of Hagerstown, Md. This is change must be. I have also $14 hundred certificate at Clover, S. C., Manfacturing Company, M. L. Smith, treasurer, put there the 11th of April, 1910, and no interest as yet drawn at 7 *per cent.* See that it is drawn by check. That I wish to go to."

It is conceded by the appellants that if "to," the last word in the codicil, is to be treated as correctly spelled, the clause or sentence as to the $1400 certificate is meaningless; but it is insisted that if the word "to" be treated as intended for the adverb "too," then the meaning is plain. The last property bequeathed in the codicil immediately before the clause in question was precisely the same kind of a chose in action as that disposed of, or attempted to be disposed of, by the last clause. The persons to whom

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the $600 certificate, or its proceeds, is given are the same persons who claim that they are the beneficiaries intended under the last clause. If it had been the intention of the testator to give both certificates to the same parties and in the same proportions, why was it not done in one clause? The fact that she did not so dispose of them would tend to show that she did not intend to give the $600 certificate and the $1400 certificate to the same persons. The codicil is wholly in the handwriting of the testatrix, and she was the owner of both certificates when it was written. Instead of the codicil, taken as a whole, showing a manifest intention on the part of the testatrix to give the $1400 certificate as well as the $600 certificate to the same persons, it shows, as it seems to us, an intent not to do so. It is well settled that where the testator's intention is manifest from the whole will and surrounding circumstances, but is endangered and obscured by inapt and inaccurate modes of expression, the language used will be subordinated to that intention, and in order to give effect to such intention one word may be substituted for another, as is asked to be done in this case. *Brewer* v. *Fue,* 1 Call (5 Va.) 212; *East* v. *Garrett,* 84 Va. 523; 2 Minor's Inst. (1st ed.) 1114-1116; 40 Cyc. 1399, 1401. But the right of the court in construing a will to mould its language by rejecting, supplying, transposing or substituting words only exists where the testator's intention is clear or manifest from the context and the surrounding circumstances. 40 Cyc. 1399-1400; 2 Min. Inst., 1112-1114, 1115, and authorities cited. But in this case no such manifest or clear intent, or any intent at all, appears to give the $1400 certificate to the appellants as would authorize the court to substitute "too" for "to" or give "to" the meaning of "too." Indeed, if such a change was made, it would not then clearly appear that the testator intended to give the $1400 certificate to the appellants.

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We are of opinion that the corporation court did not err in holding that the clause in question is so vague and indefinite that it cannot be determined with any degree of certainty what the testatrix did mean, and that the $1400 certificate passes under the residuary clause.

Upon the whole case, we are of opinion that there is no error in the decree complained of, and that it must be affirmed.

Affirmed.

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Syllabus.

Richmond

MUTUAL FIRE INSURANCE COMPANY v. TURNER.

November 20, 1913.

1. INSURANCE—*Notice of Assessments—Sufficiency—Custom—Case at Bar.*—Where the by-laws of a mutual fire insurance company are made a part of each policy of insurance issued by the company, and they provide that mailing notice of assessments "to the post-office address given it by the member in the application for insurance (and in case of change of same, such address as the member shall, in writing, furnish the secretary) shall in all cases be sufficient notice to such member," a printed notice, inclosed in an open one-cent envelope, addressed to the member at the address given in the application, is a sufficient notice under the by-law, when the member had not, in writing, furnished the secretary of the company any other address. The fact that the member was absent from home when the notice was mailed, and had left instructions with the postmaster at her home address to forward her mail; that two former notices had been on post-cards, which were forwardable mail matter, but that the notice in the one-cent envelope was not forwardable, does not change the result, as the notice was given in the manner provided by the contract of insurance. The receipt of two notices by post-card was wholly insufficient to justify the member in supposing that the company had adopted as a rule the post-card method of sending notices, and would never employ any other method.
2. INSURANCE—*Notice—Reasonableness.*—If any question of reasonableness of the method of giving notice in the case at bar should have been submitted to the jury at all, it should have been the reasonableness of the course adopted, not of a course not adopted.
3. INSURANCE—*Liens—Forfeiture—Renewal of Policy.*—Where the payment of each annual assessment on an insurance policy is a renewal of the policy, the fact that when the policy was first issued there were undisclosed liens on the property insured did not work a forfeiture of the policy where several annual assessments were paid after the liens were discharged.

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Error to a judgment of the Circuit Court of Clarke county on a complaint filed by Harriot S. Turner. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

A. Moore, Jr., Edward Nichols, Moore, Barbour, Keith & McCandlish, for the plaintiff in error.

Ward & Larrick and *F. B. Whiting,* for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This suit was brought by Harriot S. Turner to recover of the plaintiff in error $1,000, the amount of an insurance policy against loss by fire issued by it upon certain real estate owned by the plaintiff.

Two defenses were made by the defendant company: (1) That the plaintiff failed to pay an assessment ordered by the board of directors, which was due December 31, 1910, and that after that date, under the terms of the policy, it was suspended and had no force or effect at the date of the loss; (2) that contrary to the plaintiff's statement and representation in her application for the insurance there was, at the time of such application, a lien on the property created by the plaintiff.

There was a verdict and judgment in favor of the plaintiff which we are asked to review.

The defendant is a mutual fire insurance company, organized under a charter granted by the State of Virginia. Acts 1897-8, page 17. The application for the policy sued on contains the following covenant: "That this application and the policy to be issued, embracing the property above

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described, shall be taken and construed in connection with the charter of said company, its constitution and by-laws, as embodying the entire final contract between the undersigned and said company." The defendant company has no paid-up capital. Persons insuring pay a premium in advance for the first year's insurance, and also give to the company what is termed a premium note, which is subject to such assessments as may be necessary, in the discretion of the board of directors, to discharge the obligations and liabilities of the company. All persons insured by the company become members thereof, and are bound to the company and to each other to make good their proportionate amount (which shall be in proportion to the amount of their several premium notes) of any loss or damage by fire or lightning for which the company is liable. The purpose is not to make money, but, by means of the organization, to secure protection against fire at the least possible cost. To accomplish this, prompt payment of assessments to pay losses is essential. Under the method of operation adopted by the company, all premiums on all policies were calculated to the first day of January every year, and all assessments were made in advance and made payable on or before the 31st day of December of each year, and, unless paid on or before that day, the insurance became suspended under the provisions of the contract.

The sixth by-law provides: "In the event of default in the payment of any assessment which may at any time be made on the premium notes given to and held by this company on or before December 31st of each year, as to the annual assessment . . . then the policy of such delinquent member shall be suspended and be not binding on the said company until payment of such assessment or assessments shall be made"; and further provides: 'But payment of such delinquent assessment or assessments shall in

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no case entitle the assured to the benefit of a loss or damage sustained during such suspension'; and provides, further, that notice of such assessment shall be mailed to the assured at least thirty days before the final or last day for payment thereof."

This by-law is enacted in pursuance of the express authority to that effect contained in section 12 of the act of incorporation. Section 11 of the charter provides that the board of directors "shall, before the commencement of each fiscal year, at such time as it deems proper, make an approximate estimate of the amount of money which said company is likely to need during the next fiscal year . . . and how much of said premium note or bond will probably be required to discharge all said liabilities, losses, claims and demands, and shall call on the insured to pay the same by such time as may be specified in the order or by-laws. . . . Each member shall be notified of the rate of assessment, payment of which is called for, and the time in which it is required to be made, at least thirty days before the final or last day of payment. Mailing such notice to the post-office address given by the member in the application for insurance (and in case of change of the same, such address as the member shall, in writing, furnish the secretary) shall in all cases be sufficient notice to such member."

The application of the insured contains the stipulation and agreement that all the answers to the questions therein propounded shall be construed as material in all cases.

The record shows that on October 7, 1907, George E. Pflaster, acting on behalf of his mother-in-law, the plaintiff in this suit, made application in writing to the defendant company for insurance to the amount of $1,000 on a certain tenant house situated on her farm in Clarke county. The policy was issued in the name of the plaintiff, Harriot S. Turner, and a premium note for $200 was

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executed in her name by Pflaster. The cash payment made at the time of the insurance carried the policy for fourteen months and twenty-three days, to January 1, 1909; as already seen, all premiums being calculated to that day in each year and made payable on or before December 31. It appears that the insured did not pay her premium assessed in the year 1908 or 1909 until some time after it was due. She did, however, subsequently pay it, and thereupon her policy, which had been suspended, was reinstated. The premium assessed the next year (1909) for the year 1910 was paid within the time prescribed by the by-laws. The next premium due was that assessed in 1910 for the year 1911. This premium was due December 31, 1910, and was not paid, and the policy became suspended. The premium remained unpaid after the policy was suspended until January 9, 1911, when the property insured was destroyed by fire. It thus appears that the plaintiff was called upon but three times after she became a member of the company to pay her annual assessment, and that on two of these occasions she was in default. Her indifference to paying her premiums when due is further shown by her own testimony, wherein she admits knowledge of the fact that, under the rules of the company, the premium for 1911 was due and payable on or before December 31, 1910, and yet she took no notice of it, saying: "Why should I bother myself about their business; it is their business to notify me, and I don't intend to pay until I am notified."

In her application for insurance, the plaintiff stated, in answer to a question, that her post-office address was "Bluemont, Virginia." This information for the guidance of the company was acted upon, and each of the three notices of assessment that the company was called upon to give the plaintiff was sent to that address. The record shows that the plaintiff had a home at Bluemont, Virginia,

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where she lived a large part of the year. Her son-in-law, George E. Pflaster, and his wife, her daughter, lived at this home with her. She also maintained a home in the city of Washington, where she spent a portion of her time. She appears to have spent much of her time traveling about, and was absent from her Bluemont home at the time the third and last assessment was sent to that address, in accordance with the directions contained in her application for insurance. Before leaving home she directed the postmaster at Bluemont to forward her mail. The record shows that her home at Bluemont was on a free delivery route, with a mail box in front of her house with her name upon it, and that the notice now in question was delivered there and received by her son-in-law. The first two notices of assessment sent to the plaintiff were by postal cards, and it appears that it had been the practice of the company generally to send these notices in the form of postal cards. The third notice now in question was mailed to every member of the company, including the plaintiff, in the form of a printed circular enclosed in an open one-cent envelope, with the return request of the company printed thereon. It also appears that postal cards are first-class mail matter, and upon request of the addressee, can be forwarded from one post-office to another, whereas printed notices mailed in unsealed stamped envelopes, with a one-cent stamp on them, cannot be forwarded without the payment of additional postage, but that in all other respects they are treated as first-class matter.

Upon these facts bearing on the giving of the notice by mail, as permitted by the charter, the circuit court, over the objection of the defendant, gave instruction No. 1 for the plaintiff, as follows: "If the jury believe from the evidence that the defendant had, before November, 1910, sent its notices of assessment by postal card, or in such

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way that the mail could be forwarded by the local postmaster, and such had been its custom and practice, and that the plaintiff had received such notices and they were so stamped that they could be forwarded, and that Mrs. H. S. Turner, the plaintiff, had directed the postmaster at Bluemont to forward her mail to her, and he had forwarded all of her mail which, under the post-office regulations, could be forwarded, and that the defendant company, in 1910, changed its rule, and instead of sending notices of assessment by postal, or in such a way that such notices could be forwarded the addressee, it sent such notices in a printed circular and put it in a one-cent envelope, which was not forwardable under the post-office regulations; and that she, the plaintiff, had no notice of such change and did not receive the printed circular, and she had relied upon the custom and practice of the company, in the ordinary course of business, to mail its assessment notices to its policyholders in first-class mail; and such method was the proper and ordinary course of business to pursue, which reasonable and ordinary business prudence required, if, because of the change of method of mailing, the notice was not forwarded to and received by the plaintiff, or anyone authorized by her to receive the same, then this change of method of mailing was not sufficient, and is not a good defense to this action."

We are of opinion that this instruction is erroneous and should not have been given. It ignores the contract between the parties, which was, that "mailing such notice to the post-office address given by the member in the application for insurance (and in case of change of the same, such address as the member shall in writing furnish the secretary) shall in all cases be sufficient notice to such member." Charter, section 11.

It is not pretended that the plaintiff ever intimated to the company, in writing or otherwise, that she had changed

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her post-office address as given in her application. This provision of the contract shows that it was within the contemplation of the parties that, if the insured changed her post-office address, it was her duty to notify the secretary of the company, so that notice could be sent her without extra expense. Giving notice in writing to the secretary of the company of any change in the plaintiff's post-office address was, under the express terms of the contract, essential in order to impose any duty upon the company with respect to such new address. The company had no knowledge that the plaintiff was absent from home or that she had instructed the postmaster at Bluemont to forward her mail, and if it had known these facts it would have been under no contract obligation to put sufficient postage upon the notice to enable the postmaster to forward the same to such address as the plaintiff might direct. The company discharged its entire contract obligations with respect to this notice when it placed the envelope enclosing the same in the post-office at Waterford, Va., its home office, with sufficient postage thereon to secure its transmission to the post-office at Bluemont, Va., the post-office address given by the plaintiff in her application.

The facts do not justify the suggestion of this instruction—that the jury might consider whether the defendant had waived its contract rights by some previous habit of the company to send out notices by postal card, or that the company had changed its rule with respect to mailing notices by postal card. The contract by which the parties are bound contains no provision obligating the company to send these notices by postal card, or in any other designated way. The evidence does not show any rule of the company on the subject, nor does it establish any custom with respect to the method. So far as the plaintiff is concerned, she had only received two notices prior to the one in question, which was wholly insufficient to justify her

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in supposing that the company had adopted as a rule the postal card method of sending notices, and would never employ any other method. This instruction is further erroneous in submitting to the jury the question whether or not mailing notices by first-class mail was the proper and ordinary course of business to pursue, which reasonable and ordinary business prudence required. If any question of reasonableness should have been submitted to the jury at all, it should have been the reasonableness, not of a rule that had not been followed in the case then before them, but the reasonableness, under all the circumstances, of the method which was followed. It was, however, not a question of the reasonableness of either method. The only question was whether or not the defendant had deposited the notice in the post-office with sufficient postage paid thereon to insure its delivery at the post-office which the plaintiff had given. This was all that the contract required and all that the plaintiff was entitled to demand.

The converse of the propositions contained in instruction No. 1 for the plaintiff is contained in the following instructions asked for by the defendant, which the court refused to give:

"L. The court instructs the jury that if they believe from the evidence that the plaintiff, at the time of her application for the policy in litigation, either by herself or through her agent, gave as her post-office address Bluemont, Virginia, and that she has not since, by written notice to said company, directed a change to be made in such address; and if they further believe from the evidence that on or before the 30th day of November, 1910, a notice setting forth the rate of assessment fixed by the board of directors to meet the expenses of the company for the year 1911, and the time by which the assessment was to be paid, was put in an envelope addressed to the plaintiff

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at Bluemont, Virginia, and deposited in the post-office at Waterford, Virginia, the place of the home office of the defendant company, for transmission to the plaintiff, duly stamped, and that the plaintiff did not prior to the occurrence of the fire by which the building insured was destroyed pay to the defendant said assessment, then they shall find for the defendant; the court instructing the jury that it is immaterial whether or not said notice was actually received by the plaintiff or not.

"M. The court instructs the jury that, mailing such form of notice of assessment as has been proven to have been used by the defendant company in this case, in giving its members notices of the assessment for the year 1911, enclosed in an unsealed envelope, with a one-cent postage stamp attached, constitutes a sufficient mailing of such notice, if the jury further believe from the evidence that such notice was addressed to the plaintiff at the post-office address furnished to the company in accordance with its by-laws and regulations at least thirty days before the said assessment became payable.

"N. The court instructs the jury that in the application of the assured for membership in the defendant company, which is the foundation of the policy sued on in this case, the post-office address of the assured is given by her as Bluemont; and the court further instructs the jury that there is no evidence in this case tending to show that said post-office address was subsequently changed by means of notice in writing to the defendant company; and if the jury believe from the evidence that the board of directors of the defendant company fixed the assessment on its members for the year 1911, and that the by-laws of the company prescribed that the same should be paid on or before December 31, 1910; and that on or before the 30th day of November, 1910, the defendant company caused printed notice of the rate of said assessment and the time

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fixed for payment of the same to be deposited in the post-office at Waterford, Virginia, addressed to the plaintiff at Bluemont, with sufficient postage thereon to pay for its transmission to Bluemont, Virginia, and that the said plaintiff failed to pay the said assessment prior to the date of the destruction of the insured building, they will find for the defendant, the court instructing the jury for the purpose of this case that it is immaterial whether the said plaintiff ever actually received said notice or not."

Without further comment, it is sufficient to say that these three instructions asked for by the defendant correctly state the law of the case presented by the record, and should have been given.

The action of the circuit court in giving instruction No. 3, asked for by the plaintiff, is assigned as error. That instruction is as follows:

"No. 3. The jury are instructed that if the plaintiff had paid off and discharged the deed of trust on the property in October, 1909, and that thereafter the policy was regularly continued in force by payment of the premium in 1909, and neither since that date nor at the time of the fire was there any lien on the property, the jury are instructed that the existence of the lien at the time of the policy worked no forfeiture thereof."

The objection to this instruction is not well taken. The record shows that the lien which was on the property at the time of the issuance of the policy was paid off on October 27, 1909, and that after it was so paid off the company collected the premium for 1910 and reinstated the policy and assessed it as a policy in force for 1910. Under the constitution and by-laws, which are a part of the contract between the parties, the payment of each annual assessment is a renewal of the policy. When, therefore, the plaintiff paid in 1909 the premium for 1910 it renewed the policy for another year, and at the time the

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insurance was thus renewed for the year 1910 there was no lien upon the property and none has been created since.

It is further insisted that the court erred in permitting the witness, George E. Pflaster, who signed the application and the premium note on behalf of the plaintiff, to testify that both the application and the note were in blank when he signed them; and, further, to testify that the word "none," in answer to the question in the application with respect to incumbrances, was not in his handwriting and was not put there at his direction. This evidence was not objected to until the witness had left the stand, when the court was asked to exclude it upon the ground that it was an attempt, by parol evidence, to alter and vary the terms of a written contract.

The evidence was clearly inadmissible. *Southern Mutual Ins. Co.* v. *Yates,* 28 Gratt. (69 Va.) 585. The learned judge of the circuit court recognizes that this evidence was not admissible, certifying in bill of exceptions No. 1 that it was all excluded by instructions Nos. 2 and 3. These instructions do not in terms exclude the evidence, but their effect is to do so. Further consideration of this matter is, however, unnecessary, because the case must be remanded, and, if another trial is had, the evidence objected to will not be admitted.

The judgment complained of must be reversed, the verdict of the jury set aside and the case remanded to the circuit court for a new trial, if the plaintiff be so advised, to be had not in conflict with the views expressed in this opinion.

Reversed.

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Syllabus.

Richmond

POWHATAN LIME COMPANY v. AFFLECK'S ADMINISTRATOR.

November 20, 1913.

1. MASTER AND SERVANT—*Dangerous Place—Youthful Employee—Contract of Employment—Negligence.*—If a manufacturing company, some of whose work is of dangerous character, stipulates with the father of an inexperienced young boy that he shall be employed only in certain designated departments of the work not dangerous, it is negligence on the part of the company to expose the boy to risks different from those incident to his contract of employment in the performance of duties for which he was unfitted by reason of lack of experience and skill.

2. MASTER AND SERVANT—*Risks Not Incident to Contract—Contributory Negligence—Estoppel.*—Although a master may have been negligent in exposing a servant to risks not incident to his contract of employment, he is not thereby estopped from setting up the contributory negligence of the servant as a bar to an action for personal injuries received by him while so exposed. If the servant has been guilty of negligence which proximately contributes to his injury he cannot recover.

3. INSTRUCTIONS—*Contradictory—Effect—Appeal and Error.*—Where contradictory instructions on a material point in a case have been given, the verdict of the jury should be set aside, as it cannot be known by which the jury were controlled.

4. NEGLIGENCE—*Contributory Negligence—What Constitutes—Effect.*—It is not necessary to the defense of contributory negligence to show that it caused the injury complained of. It is enough to show that it proximately contributed to it. If it appears that the negligence of the plaintiff has contributed as an efficient cause to the injury of which he complains, he cannot recover. The court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most at fault, nor recognize any gradation of fault in such cases, but will leave the parties where it finds them.

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Error to a judgment of the Circuit Court of Shenandoah county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Marshall McCormick, P. H. C. Cabell and *M. L. Walton*, for the paintiff in error.

Tavenner & Bauserman and *C. B. Guyer*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

In this suit Affleck's administrator recovered a judgment against the Powhatan Lime Company, which is before us upon a writ of error.

The Powhatan Lime Company is a Virginia corporation, engaged in the quarrying of rock and in the manufacture of it into lime and marketing the same. It employs a number of servants, and one of its departments provides for the nailing of barrels. The declaration alleges that in the conduct of its business it uses complicated machinery, and requires the performance of duties on the part of its employees, some of which are in their nature dangerous; that as a part of its enterprise the defendant requires its employees to move cars over its track from place to place, preparatory to loading the same with lime for shipment, these cars being frequently moved down an incline on a spur track, and while they rest upon this track are held in place by tightening the brakes and by a scotch or wedge placed under the lower wheel of the car, and when it is necessary to move the car, the brakes are, of course, loosened and the scotch or wedge taken out.

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The declaration further avers that William L. Affleck, who was a minor, was employed by the limestone company, with the consent of his father, to labor at the work of nailing barrels, and to do other like work not of a more dangerous character; that Affleck was a boy sixteen years of age, of small stature, and wanting in strength, experience and capacity; that defendant assigned this infant to work, the dangers of which he was incapable of comprehending and avoiding, without any instruction as to the manner in which the same was to be performed and the dangers incident thereto guarded against.

On behalf of the defendant, the facts now material to be considered are that at the place of the accident the tracks ran north and south, and on the right-hand side of the track there was a bank or cut about six or seven feet in depth; that a car projecting over the track would leave a space of only six or seven inches between the car and the bank; that owing to this condition it was dangerous to work upon the east side of the track, and there is evidence tending to prove that the defendant instructed the plaintiff's intestate not to go upon the east side of the track at all, but to perform his duties upon the west side, which there is evidence tending to show was a reasonably safe place. The plaintiff's intestate disregarded this instruction, went upon the east side of the track, and, as the plaintiff in error contends, thus became the author of his own injury.

There were a number of exceptions taken during the progress of the trial to the admission of evidence, but we find no error in the rulings of the court with respect to them, and none of them presents any question of sufficient interest or importance to require further consideration. A number of instructions were offered, some of which were given and others refused, but in the main we think the rulings of the court with respect to these instructions

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were correct, and the instructions given were quite sufficient to enable the jury intelligently to consider the evidence, except with respect to two instructions which deal with the defense of contributory negligence, one of which was given at the instance of the plaintiff in error.

The doctrine of contributory negligence implies the existence of negligence. We are of opinion that the evidence tends to prove negligence on the part of the plaintiff in error. There is evidence which tends to show that the boy who was killed was only sixteen years of age; a country lad, inexperienced in the use of machinery, mentally and physically undeveloped, and of small stature. There is proof that his father, in view of these facts, was careful to inform the plaintiff in error, and to make it a condition of the boy's employment that he should not be placed in positions of danger; the father stating at the time that he did not care for him to go about machinery, as he never had had any experience. The result was an understanding with the plaintiff in error that he was to be employed in the barrel department in nailing barrels, or if there was no regular work in that department, to pick up lime or unload coal.

From the facts we have stated, we think the jury might have fairly inferred that the defendant company had been guilty of negligence in exposing the boy to risks different from those incident to his contract of employment, in the performance of duties for which he was unfitted by reason of lack of experience and skill.

The contention of the defendant in error is that by reason of the contract of employment and its breach, the plaintiff in error was estopped to make the defense of contributory negligence; but in this view we cannot concur. Although the plaintiff in error may have been guilty of negligence, yet if the contributory negligence of the defendant in error's intestate contributed to the injury, he

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cannot recover. As we have said, contributory negligence on the part of the person injured always implies negligence on the part of the person causing the injury.

In Labatt on Master and Servant, p. 3992, sec. 1387, the doctrine for which defendant in error contends, is thus stated: "It is said that the master's order to a servant to do work outside the scope of his original employment operates as an implied assurance that the new duties may be performed without incurring any abnormal risks. Under this theory it would seem that the master is virtually converted, for the time being, into a guarantor of the servant's safety. Upon the assumption that this is the effect of the Indiana decisions, they have been condemned in Alabama.

"The disapproval thus expressed is, in the opinion of the present writer, well founded. There is no valid ground for departing in this instance from the general principle discussed in chapter LXXX," *ante* (which deals with knowledge as an element of the master's liability). "It should be observed, however, that the effect of the sweeping language used by the Indiana courts is considerably qualified by the fact that the defense of an assumption of the risks is conceded to be a bar to the action if the evidence shows that those risks were, as a matter of fact, appreciated." See *Brazil Block Co.* v. *Hoodlet,* 129 Ind. 327, 27 N. E. 741; *Mary Lee Coal & R. Co.* v. *Chambliss,* 97 Ala. 171, 11 South. 897.

This brings us to the defense of contributory negligence. There is evidence, as we have already said, which tends to show that the east side of the track was a dangerous place in which to put an inexperienced youth to work. The west side of the track, however, the evidence tends to prove was one of reasonable safety, and plaintiff's intestate was warned not to work upon the east side, but upon the west side only. At the instance of the defendant in error the court instructed the jury that "contributory negligence

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on the part of the decedent is such negligence as contributes directly to and is the proximate cause of the accident or injury complained of, and that if the defendant relies upon the defense of contributory negligence upon the part of the decedent, the burden of proof of such contributory negligence rests upon the said defendant, unless the contributory negligence appears from the plaintiff's own evidence, in which case the burden shifts."

On behalf of the plaintiff in error the court instructed the jury that "if it believes from the evidence that there was no check under the wheel of the car next to the embankment, and that the plaintiff's intestate did give the signal to Funkhouser to move the car, walked across the track to the other side next to the embankment, when there was no necessity for his so doing, and this was the proximate cause of his injury, if the jury so believes, then this was contributory negligence, as a matter of law, and the plaintiff cannot recover. Such conduct need not have been the sole cause of his injury, but, if it contributed to his injury and subsequent death, this is sufficient and the verdict should be for the defendant."

These two instructions are irreconcilable. The instruction asked for and given at the instance of the plaintiff in error is in accordance with numerous decisions of this court, while that given on behalf of the defendant in error is wholly at variance with it. We have held in numerous cases that where such is the case, it would be impossible to say by which the jury was controlled, and it constitutes reversible error.

In *Richmond Traction Co.* v. *Hildebrand*, 98 Va. 22, 34 S. E. 888, the court dealing with this subject uses the following language: "The instruction now under consideration is, however, not merely defective, but an entirely incorrect statement of the law well calculated to mislead the jury. The two instructions are inconsistent with, or contradictory to each other, and it is impossible to say

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whether the jury was controlled by the good or the bad in reaching their conclusion.

"In Thompson on Trials, vol. 2, sec. 2326, it is said: 'The giving of instructions which are inconsistent with or contradictory to each other is error, for the reason that the jury will be as likely to follow the good as the bad, and it cannot be known which they have followed, and which way soever they go, if there is an appeal or writ of error, the judgment must be reversed. Therefore, an erroneous instruction is not cured by another instruction on the same subject which is correct, unless the former is by the latter specifically withdrawn.' " See this case as reported in 99 Va. 48, 34 S. E. 888.

The same doctrine is maintained in *C. & O. Ry. Co.* v. Whitlow, 104 Va. 90, 51 S. E. 182, where it is said: "Where contradictory instructions on a material point in a case have been given, the verdict of the jury should be set aside, as it cannot be said whether the jury were controlled by the one or the other."

And so in the case of *Southern Ry. Co.* v. *Hansbrough*, 107 Va. 733, 60 S. E. 58, "If contradictory instructions on a material point in the case have been given, the verdict of the jury should be set aside, as it cannot be known by which the jury were controlled."

The same doctrine is stated in *Va. & N. C. Wheel Co.* v. *Chalkley*, 98 Va. 62, 34 S. E. 976; *N. & W. Ry. Co.* v. *Mann*, 99 Va. 180, 37 S. E. 849; *Richmond Pass. & Power Co.* v. Steger, 101 Va. 319, 43 S. E. 612.

That the instruction given at the instance of the defendant in error does not correctly propound the law of contributory negligence as established, appears from the following decisions:

In *N. & W. Ry. Co.* v. *Cromer*, 99 Va. 763, 40 S. E. 54, the law is thus stated: "It is not necessary to the defense of contributory negligence to show that but for it the accident would not have occurred. It is enough to show that

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the negligence of the plaintiff contributed to the injury. The question to be determined is not whether the plaintiff's negligence caused, but whether it contributed to, the injury of which he complains."

The position of this court is well stated in *Richmond Traction Co.* v. *Martin,* 102 Va. 209, 45 S. E. 886: "The well-known rule in this class of cases is that a plaintiff seeking to recover damages for an injury caused by the negligence of the defendant must himself be free from negligence, and if it appears that his negligence has contributed as an efficient cause to the injury of which he complains, the court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most at fault. The law recognizes no gradations of fault in such case, and where both parties have been guilty of negligence, as a general rule, there can be no recovery. There is really no distinction between negligence in the plaintiff and negligence in the defendant, except that the negligence of the former is called 'contributory negligence.' "

Upon the whole case, our conclusion is that while there is evidence tending to show negligence upon the part of plaintiff in error, there is also evidence tending to show contributory negligence upon the part of defendant in error's intestate; that in submitting the case to the jury upon the defense of contributory negligence the court erred in giving to the jury inconsistent instructions; that the instruction given at the instance of the defendant in error cannot be reconciled with the numerous decisions of this court dealing with this subject, while the instruction asked for and given at the instance of plaintiff in error is a correct exposition of the law.

For this error we are constrained to reverse the case and remand it to the circuit court for a new trial to be had in accordance with the views herein expressed.

Reversed.

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Richmond

STARKE v. STORM'S EXECUTOR.

November 20, 1913.

1. EQUITY—*Amended Bill—When Not Allowed.*—Where an amended bill sets up facts practically identical with those contained in the original bill, and sets forth no new matter that was not known at the time of the argument of the demurrer to the original bill, the trial court may properly refuse to allow it to be filed.

2. MASTER AND SERVANT—*Voluntary Services—Compensation—Implied Contract.*—A boy who voluntarily seeks employment in a household to clean shoes, brush clothes and do other incidental things about the house, and is accepted for that purpose, with nothing said as to compensation by either party, occupies the position of servant, and there is an implied contract on the part of the master to feed, clothe and lodge him, for otherwise he could not serve; but the law will not imply a contract to make any other compensation for such services, and, if there is no express contract, there can be no recovery therefor.

3. GUARDIAN AND WARD—*Guardian De Facto.*—A guardian *de facto* or *de sontort* is purely a creature of a court of equity, and is one who takes possession of an infant's property without right or lawful authority, and will be required to account therefor.

4. JURISDICTION—*Law—Equity—Personal Services.*—For personal services rendered by an adult the remedy at law is plain, adequate and complete, and there is no jurisdiction in equity.

Appeal from a decree of the Circuit Court of Albemarle county. Decree for the defendant. Complainant appeals.

Affirmed.

The opinion states the case.

Gilmer & Gilmer, for the appellant.

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Hanckel & Hanckel and *Perkins, Perkins & Walker*, for the appellee.

HARRISON, J., delivered the opinion of the court.

In January, 1911, one year after the death of Edward H. Storm and about four years after the cause of action, if any, arose, W. F. Starke filed this bill asking that a court of equity award him a decree against the estate of Edward H. Storm for the sum of $6,736.84. Of this amount $1,736.84 was alleged to be for services rendered by the complainant to the deceased during his lifetime, and the remaining $5,000 was alleged to be damages due for the failure of Storm to provide complainant with an education. There was a demurrer to this bill, and thereupon the complainant tendered an amended bill which was practically a copy of the original bill, except that it eliminated the claim for $5,000 damages for failure to educate, and made W. F. Storm, a brother of the deceased, who was the sole beneficiary under his will, a party defendant. The circuit court refused to allow the amended bill to be filed, sustained the demurrer to the original bill, and ordered that it be dismissed. From that decree this appeal was taken.

There was no error in rejecting the amended bill. It set forth no new matter that was not known at the time of the argument of the demurrer to the original bill, and the facts are practically identical with those contained in the original bill, and in the exercise of a sound discretion the court properly refused to allow it to be filed.

In the case of *Bowe* v. *Scott*, 113 Va. 499, 75 S. E. 123, the syllabus, which is sustained by the opinion, states the law as follows: "While courts are liberal in allowing amendments of bills, and have discretion in the matter, still this discretion is in no sense arbitrary or capricious,

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but is at all times hedged about and governed by rules which have long been established and recognized as binding upon the courts. Where the matter of amendment is similar to that contained in the bill, and was either known to the complainants, or might have been known to them, prior to the argument of the demurrer to the original bill, but was not brought forward until said demurrer was sustained on a ground involving its dismissal, the motion to amend comes too late."

The substantial facts as stated in the bill are as follows: That the complainant was born January 18, 1885, at Pavelsthewe, in Germany, and was at the age of thirteen living with his maternal grandmother, his father, mother and maternal grandfather being dead. About this time he learned that Edward H. Storm wanted a boy to wait upon him in the capacity of a servant. The boy, at the age of thirteen, voluntarily applied for the position and was accepted by Storm, who took him into his home, furnished him with shelter, food and clothing, dressing him in the livery of a servant, and in return receiving from the boy small services such as cleaning shoes, brushing clothes, cleaning guns, picking up game when Storm was hunting, etc. There was no contract, either express or implied, to pay the boy a consideration in money for his services when he went to live with Storm. This relation continued between the parties, in Germany, until July, 1910, when Storm came to New York bringing the boy with him. In February, 1910, they came to Albemarle county, where Storm bought a farm upon which he and the boy lived in the same relation and upon the same terms until September, 1905, when the complainant, then twenty years of age, voluntarily left the service of Storm and entered the railroad service.

The bill alleges that during the period prior to September, 1905, when the complainant entered the railroad ser-

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vice, Storm had paid him at different times about $120, and that more than half that sum had been paid to him during the last year before he went to the railroad. The complainant remained in the service of the railroad from September, 1905, until November, 1908, when he returned to the service of Storm, at the age of twenty-three, where he remained until January, 1910, when Storm died. There is no allegation that the complainant ever asserted any claim for services against Storm during his lifetime. He alleges that when he returned from the railroad it was at the request of Storm by letter, saying that he would compensate him for work previously done, and would furnish him with board and lodging and pay him $400 per year to work as he had done before. The letter referred to is not produced.

Upon the facts alleged we are of opinion that no other relation but that of master and servant existed between these parties. Storm wanted a boy to wait on him and do the work of a servant. The boy sought the position and was accepted, not one word being said about wages. There was an implied obligation to feed, clothe and lodge the servant, otherwise he could not have served. The services were not, however, rendered with the master's assent under such circumstances as raised a presumption that the infant expected to be paid or the adult to pay. It was a contract for necessaries which the infant had the right to make, and which could be terminated at the will of either party.

The law is very well stated in Wood on Master and Servant (2nd Ed.), p. 14, sec. 9, as follows: "The same rule prevails as to an infant as to an adult in reference to merely voluntary services. No recovery can be had by him unless there was an agreement, expressed or implied, to pay him for his services, or unless the services were rendered at the request of the person sought to be charged, or with his assent, under such circumstances as raise a

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presumption that the infant expected to have pay therefor, and that the adult expected to pay him. Thus in *DeFrance* v. *Austin,* 9 Penn. St. 309, the plaintiff, who was a minor, when not at work elsewhere, lived in his uncle's family and rendered services for him as the children of the family did, and during such time was supplied by the uncle with food and clothing. It was held that no implied promise to pay him for his services could be raised, and that no recovery could be had by him therefor. In *Wilhelm* v. *Hardman,* 13 Md. 140, the plaintiff, an infant, contracted with the defendant to work for him for his support and schooling. After having remained in the defendant's employ for some time, he broke off the contract and left his service, and brought an action for his services. The court held that inasmuch as the consideration for which the services were rendered was *actually necessary,* and as he had received the consideration *as fast as he performed his services,* and as he could not put the defendant in *statu quo,* he could not recover of him for such services, even though he offered to deduct therefrom *the value of the consideration received.*"

In the case at bar, the relation between the parties being that of master and servant, and the contract arising under that relation having been fully performed, nothing more can be recovered.

The complainant has sought to maintain the jurisdiction of a court of equity to entertain his suit upon the theory that the relation of guardian and ward existed between the parties, and in support of this theory has contended that Edward H. Storm was guardian *de facto,* or *de son tort.*

This position is not tenable. A guardian *de facto,* or *de son tort,* is purely a creature of a court of equity, and is one who takes possession of an infant's property without right or lawful authority and will be required to account therefor. 21 Cyc. p. 20; *Anderson* v. *Smith,* 102 Va. 697, 48 S. E. 29; *Watts* v. *Watts,* 104 Va. 269, 51 S. E. 359.

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In the case before us Storm did not take possession of any property that belonged to the complainant. It is not claimed that the complainant had a dollar of property when he entered Storm's service, but this difficulty is sought to be obviated by the contention that the wages alleged to be due constituted estate of the infant in the hands of Storm. It is unnecessary to decide in this case whether or not unpaid wages in the hands of an employer, due to an infant, can be treated as estate of such infant so as to hold the employer liable therefor as guardian *de son tort*, because, as already shown, there were no such wages in the hands of Edward H. Storm.

There is no merit in the claim of $5,000 damages for the failure of Edward H. Storm to have the complainant educated. No such obligation was implied in the contract of service; the complainant was under no restraint and could have left the service of Storm at any time.

As already seen, complainant left the service of Storm before he was twenty-one, and did not return until he was twenty-three. Storm died in little more than a year after such return. If there was anything due the complainant for services rendered during that period between his return from the railroad and the death of Storm he had a plain and adequate remedy at law for its recovery.

We are of opinion that there was no error in sustaining the demurrer and dismissing complainant's bill. The decree appealed from must, therefore, be affirmed.

Affirmed.

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Syllabus.

Richmond

STONEGA COKE AND COAL COMPANY v. WILLIAMS.

November 20, 1913.

Absent, Keith, P.

1. MASTER AND SERVANT—*Boss of Gang—Vice-Principal—Safe Place.*—Ordinarily the foreman or boss of a gang of hands employed in executing the master's orders is a mere fellow-servant with the other members of the gang, but if he is discharging a non-assignable duty of the master he is to that extent a vice-principal. One of these non-assignable duties is to exercise ordinary care to provide a reasonably safe place in which the servant is to work. If the place was originally safe, but has become unsafe during the absence of the servant, and he is ignorant of this fact, and cannot discover it by the exercise of ordinary care, it is the duty of the master to inform him of it, and, in his absence, this duty devolves upon the foreman of the gang, as vice-principal.

MASTER AND SERVANT—*Unsafe Place—Knowledge of Vice-Principal—Demurrer to Evidence.*—Since the jury might have found that the vice-principal of the defendant had knowledge of the danger to which the plaintiff was subjected, and that the proximate cause of the plaintiff's injury was the negligent failure of the vice-principal to give him warning of such danger, this court, upon a demurrer to the evidence by the defendant, must so find.

MASTER AND SERVANT—*Risks Assumed by Servant.*—An employee only assumes the risks ordinarily incident to the service, and those known to him or so obvious as to be readily observed by one of his age, experience and mental capacity in the exercise of ordinary care.

DEMURRER TO EVIDENCE—*Negligence—Contributory Negligence.*—On a demurrer to the evidence by the defendant, if, as in the case at bar, the jury might have found that the proximate cause of the plaintiff's injury was the negligence of the defendant, and that the plaintiff was without fault on his part, the court must so find.

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Error to a judgment of the Circuit Court of Wise county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Bullitt & Chalkley, for the plaintiff in error.

Vicars & Peery and *C. R. McCorkle,* for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This suit was brought to recover damages for the alleged injury of the plaintiff by the defendant company, a coal mining corporation. At the trial of the cause there was a demurrer to the evidence by the defendant company, which was overruled, and judgment given the plaintiff for the damages ascertained by the jury. This ruling of the trial court is brought under review by writ of error awarded by one of the judges of this court.

Viewing the evidence from the standpoint of the demurrer thereto, the following are the facts appearing in the record. The plaintiff, Ivory Williams, a youth of eighteen years, was, at the time of the injury of which he complains, in the employ of the defendant company as motorman at the mining operation of the company known as Roda Mine No. 2. Mine No. 2 is connected with Mine No. 1—that is to say, the entrance to both is the same; one branches off from the other about eight hundred feet from the drift-mouth of the entry. There is a track entering the mines known as the "load track" on which cars loaded with coal are pulled out of the mine with electric motors, and another track entering the mines called the "cut-around track."

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The motor upon bringing a "trip" of loaded coal cars out of the mine, and after getting down near the tipple, cut loose from the "trip" of coal cars, run past the switch of the "cut-around" track, and then run back on the "cut-around" track and into the mine about five hundred feet. The switch referred to is a cross-over switch, crossing over the "load track" and joining with a track called the "empty chute." After the motor cuts loose from the cars, they run down to the tipple by gravity, and are there dumped, and then are pushed back on the empty track and run again by gravity back on to the "empty chute," this "empty chute" being lower towards the drift-mouth than it is at the tipple. The motors are then run into the "empty chute" from a point five hundred feet within the mine, as before mentioned, pick up the empties and carry them into the mine for distribution. There is also another track shown on a diagram made a part of the record in this cause outlining the situation of the company's various tracks at the drift, which is designated as the "timber track," and extends outside of the mine down the hill to the place where timber is loaded upon cars to be taken into the mine. Still another track running off in the opposite direction from the timber track leads to the motor house, where the motors are taken for repairs, and sometimes taken for storage purposes when they can be gotten there. The "load track," it appears, was frequently blocked, and the motors, when the operators ceased to use them for the day, would be left in the "cut-around" track, frequently within the drift-mouth to the distance of as many as one hundred and fifty feet, and sometimes out of the drift-mouth around the sand house, a short distance from the drift-mouth. The defendant company, in the operation of its mine, had a day and night shift of employees, divided into crews, each having a designated foreman. The coal was hauled out of the mine by the day shift, which quit

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work at six o'clock in the evening, and the night shift went to work at this time. This night shift did not haul any coal out of the mines, or empties in, their duties being to take in timbers to be used by the miners the next day at various working places, clean up slate, make the entries safe, etc. For a distance of about 400 feet from the drift-mouth, the main entry of the mine was used in common by the crews of Mine No. 1 and Mine No. 2. One Andrew Brock was the night foreman in Mine No. 1, and A. B. Davis the night foreman in Mine No. 2. About two months before Williams (the plaintiff) was injured, he had been employed by Davis to work on his slate force, Davis having authority to employ the men who worked under him; and three or four days before the accident to Williams, Davis' regular motorman had quit, and he put Williams on as motorman. Davis admits that Williams did not ask him for this job, but that he simply put him on because he considered Williams was entitled to the job by reason of being the oldest member of his force, Davis making no inquiries of Williams as to his experience in running motors, nor had he or any one else for the company given Williams any instructions or called his attention to any rules with referenec to running motors.

On the evening that Williams was injured, which occured shortly before seven o'clock p. m., the two night crews were preparing to go into the mines—Brock into Mine No. 1, and Davis into Mine No. 2. Williams reported for duty about 6:30 o'clock and had been around on the premises near the drift-mouth for about fifteen minutes, a part of which time was spent by him at and around the motor house, when Davis, his foreman, ordered him to take his motor (which was standing on the "cut-around" track near the sand house) into the entry beyond the timber track switch (which, as before stated, was situated right at the mouth of the entry) so that motors "D" and "E"

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could be shifted from the timber track on to the "cut-around" track. But a few minutes before this (certainly not over twenty minutes) Brock had hauled with a big motor a car of brattice lumber into the entry, on the "cut-around" track, to a distance of from 25 to 35 feet from the drift-mouth, where he left it standing. This brattice lumber, for use in the mines, was of irregular lengths, and extended out over the bumpers of the car towards the drift-mouth a distance of about four feet. There was no light placed on this car, nor any signal of any kind to give warning of its presence, nor did the company have any rules with reference to lights or other signals in such cases. There were two small motors standing near the sand house on the "cut-around" track, upon one of which Williams was to go into Mine No. 2 with Davis, his foreman; and Brock, the night foreman in Mine No. 1, was to go in with his crew on the other small motor. The car loaded with brattice lumber had been pulled up the timber track by the big motor, and the big motor was standing on the timber track near the drift-mouth. It was necessary to switch the motors so that the big motor could get out of the way of the little motors and one of them could back up to and couple with the car of brattice lumber. In order to do this directions were given by Brock to Davis, according to what Brock states; or, according to Davis, he and Brock agreed that Brock should take the big motor and this car of brattice lumber from the timber track into the drift-mouth far enough to let the little motors run past the point of the switch and back on the timber track, it being the intention of Brock and Davis, after this was done, to run the big motor, with the car of brattice lumber, back towards the tipple on the "cut-around" track, when the big motor would cut loose from the car, run back into the mine past the point of the switch at the drift-mouth, and the little motors would then pull up past the point of

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the switch, back back on the "cut-around" track, and then the big motor was to back into the timber track, whereby the way would be clear for one of the small motors to run ahead into the mine about its business, and clear for the other little motor to couple to the brattice car and take it in the mine.

Brock, in accordance with the directions of Davis, or in accordance with the understanding between them, ran the big motor into the mine, so that, as before stated, the end of the car-load of lumber was from 25 to 35 feet from the drift-mouth, or the point of the switch, the point of the switch being at the drift mouth. Brock then set the brake on the big motor and walked back on the "cut-around" track to near the sand house where Williams was with his motor, and Williams was then directed by Davis to pull his motor up past the point of the switch into the drift-mouth, and back it back on the timber track. Williams, without knowledge, as he states, that the car of lumber was standing within the entry, proceeded with his motor into the entry, with the view, and in accordance with what he had been told to do, of taking it to a distance beyond the point of the switch, and there stop and wait until some switching was done and his mine foreman, Davis, joined him. Davis was standing at the mouth of the entry when he ordered Williams to take his motor in, and knew that the car of lumber was standing in the entry and that it was unguarded and with no light or signal on it, but failed to notify Williams of the fact, his only excuse for not doing so being that he thought Williams had seen the car taken in. Williams claims to have looked ahead before going into the entry, but could see nothing. When the rear end of his motor had gotten about four feet into the entry, Henry Cotton, a laborer in the mines, who was either on the rear end of Williams' motor, or standing near the drift-mouth, noticed the car of lumber standing

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on the track ahead and endeavored to warn Williams by halooing to him, but did not succeed in attracting Williams' attention until he was within two or three feet of the car of lumber. Williams then shut off his controller and endeavored to avoid the collision, both by reversing the current of his motor and by endeavoring to apply the brake, but was too close to avoid a collision with the car of lumber. He was "sorter setting down" when he first saw the car, and "sorter jumped up" then, to prevent the lumber catching him in the body. His right leg was caught between his own motor and the end of the brattice lumber and was broken just below the knee and otherwise crushed and injured.

The plaintiff, Williams, bases the liability of the defendant company to him for his injuries upon the grounds: First, because the place in which he was ordered to work was in an unsafe and dangerous condition, by reason of the car of brattice lumber being left unguarded within the entry to the mines, of which danger he was ignorant, and which he could not have discovered in the exercise of ordinary care; and the defendant company's foreman, Davis, who was the highest official of the company present at the time, had knowledge of this danger, and the duty of giving the plaintiff, Williams, warning devolved upon Davis, as vice-principal of the company; and that Davis' negligence in failing to give warning of the danger was the negligence of the company, rendering it liable for the injury resulting to the plaintiff therefrom; Second, that the defendant company was guilty of negligence in failing to adopt and promulgate proper and reasonable rules for the conduct of its business.

On the other hand, the defendant company contends that the real cause of the accident to the plaintiff was because he did not have the brake on his motor wound up as he should have had it, and that if he had had it in working

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order the accident would not have happened. Stress is also laid upon the fact that there was evidence to show that the plaintiff upon entering the drift-mouth was engaged in holding the pole to keep it in contact with the trolley wire and that this prevented him from looking ahead and prevented him from seeing the car of lumber as he might have done if he had been looking ahead.

With reference to this last contention of the defendant company, it is conceded that because of the conditions existing at the entry of the mines it was necessary that the trolley wire be made higher at this point, and that such condition of the wire made it necessary to hold the trolley pole against it. While allowing this condition to exist may not have been negligence on the part of the defendant company, in view of the fact that the uncontradicted statement of the plaintiff that, in addition to the ordinary conditions then existing, a kink in the trolley wire made it necessary for him to give attention to keeping the trolley pole in contact with the trolley wire instead of looking ahead, the jury would, upon all the evidence in the case, have been warranted in finding that he was not negligent in giving attention at the moment to keeping his pole in contact with the trolley wire instead of looking ahead of his motor, especially in view of the fact that he had a right to rely upon the premises being kept reasonably safe for him to do the work that his foreman had directed him to do.

The case, as we view it upon the facts stated, falls directly within the rule enunciated in the cases of *Lane Bros.* v. *Bauserman,* 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872, and *Low Moor Iron Co.* v. *La Bianca,* 106 Va. 83, 55 S. E. 532. The proposition of law stated in the first-named of these cases was approved and followed in the last-named, wherein it is said: "Ordinarily the foreman or boss of a gang of hands employed in executing the master's orders is a mere fellow-servant with the other members of the

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gang, but if he is discharging a non-assignable duty of the master he is to that extent a vice-principal. One of these non-assignable duties is to exercise ordinary care to provide a reasonably safe place in which the servant is to work. If the place was originally safe, but has become unsafe during the absence of the servant and he is ignorant of this fact, and cannot discover it by the exercise of ordinary care, it is the duty of the master to inform him of it, and in his absence this duty devolves upon the foreman of the gang, as vice-principal."

In this case, while Brock, as a witness for the plaintiff, and Davis, a witness for the defendant company, both state that the plaintiff, Williams, was standing near when the order was given by Davis to carry the car of brattice into the entry, and that Williams could have heard these directions and could have seen the car-load of brattice carried in, Williams testified that he neither heard the directions given by Davis with respect to the car being carried into the entry, nor saw it when carried in by Brock. As we have seen, neither Brock nor Davis state that Williams heard these directions given by Davis or saw the car carried into the entry, but only that they thought or were under the impression, that he heard the directions and saw the car carried in, so that the jury might have found the fact to be as positively stated by Williams, rather than have concluded from the impressions testified to by Brock and Davis that he did know that the car had been carried into the entry and left there. The testimony for the defendant company given by Owens, its superintendent at these mines, as well as by Brock and Davis, recognizes the fact that Williams should have been warned of the presence of the car of brattice lumber standing in the entry, if he did not know it to be there; the last two named saying that they would have warned him if they had not thought he had seen the car taken in.

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Since the jury might well have found upon the evidence that Davis, who was the highest official of the defendant company present on the grounds, had knowledge of this danger, and that the duty of warning Williams devolved upon him as vice-principal of the company, and that his negligent failure to give Williams warning of the danger was the proximate cause of the injury to him, this court must so find. *Low Moor Iron Co.* v. *La Bianca, supra,* and authorities cited.

The further contention of the defendant company, that Williams was guilty of contributory negligence in not having the brake on his motor properly wound up, is without merit. The evidence as to how quickly a motor running under control could be stopped with the brake in proper shape not only shows that the motor could be stopped a great deal quicker by reversing the current than by the use of the brake, but further shows the fact that Williams was within two or three feet of the car of lumber when he first saw it, and it was then too late to avoid the collision, even by reversing the current; therefore, the result would have been the same, whatever might have been the condition of the brake. Upon the evidence the jury would have been justified in finding that the condition in which Williams had his brake was not even a contributing cause of his injury.

With respect to the further contention, that Williams was guilty of contributory negligence in running his motor into the mine at excessive speed, and in running his motor further beyond the switch than was necessary, we deem it only necessary to refer briefly to the evidence. As to the speed of the motor, Davis, the foreman, testifying for the defendant company, stated that Williams should have had his controller on the second point. Not only did Williams say, when testifying for himself, that he had his controller on the first or second point, but Calton, testifying for the

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defendant company, stated that he had it on the second point where Davis said it should have been. The evidence placed the car of lumber in the entry at a point from 25 to 35 feet from the drift-mouth, and admitting that the two motors on the timber track were small motors, each only 12 feet long, still the three motors, including Williams,' would have reached 36 feet beyond the point of the switch, without allowing any margin at all between, or any space for clearance.

The remaining ground of demurrer to the evidence, assigned by the defendant company, is also without merit, viz., that "Williams assumed the risk of the danger which caused his injury."

Williams testified that he had never known a car of brattice lumber to be left within the entry, and that it was the custom to leave such cars outside the entry, on the timber track, while the shifting was being done; and practically all the other witnesses testify that although the day shift frequently left motors standing within the entry, it was not customary to leave cars standing therein. It further appears from the evidence that there would be but slight danger of a collision with another motor, or an ordinary car, standing in the entry, on account of the protection afforded by the bumpers. In this instance a car-load of brattice lumber was left standing unprotected within the unlighted entry, with the irregular ends of the lumber extending four feet beyond the bumpers of the car, constituting an unusual danger.

An employee only assumes the risks ordinarily incident to the service, and those known to him or so obvious as to be readily observed by one of his age, experience and mental capacity, in the exercise of ordinary care. *Southern Ry. Co.* v. *Newton,* 108 Va. 114, 60 S. E. 625; *U. S. Leather Co.* v. *Showalter,* 113 Va. 479, 74 S. E. 400.

Upon the whole case in judgment, we are of opinion that

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if it had gone to the jury they might readily and reasonably have found that the plaintiff, Williams, sustained the injury of which he complains without fault on his part, and solely as a result of the negligence of the defendant company, and it is too well settled to need citation of authority that if the jury might have found the defendant company guilty of negligence and the plaintiff free from contributory negligence, the court must so find on a demurrer to the evidence.

The judgment of the circuit court is affirmed.

Affirmed.

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Richmond

TRIPLETT v. GUDEBROD.

November 20, 1913.

1. CONTRACTS—*Offer and Acceptance—Completed Contract.*—An option to purchase land cannot, without the consent of the vendor, be accepted on any other or different terms from those contained in the option. In the case in judgment, the option on one tract of land provided that the proposed purchaser should pay a stated price per acre for the land, and also reimburse the vendor for certain expenses that he would necessarily have to incur pending an option given by the same vendor to the same proposed purchaser on an entirely different and larger tract. These expenses the proposed purchaser refused to pay, and as the vendor had the right to fix his own terms in the option, and the vendee refused to accede to them, there was no completed contract between the parties for the sale and purchase of that tract of land.

Appeal from a decree of the Circuit Court of Shenandoah county. Decree for the complainant. Defendant appeals.

Reversed.

The opinion states the case.

Tavenner & Bauserman, for the appellant.

R. T. Barton, E. D. Newman and *Walton & Walton,* for the appellee.

BUCHANAN, J., delivered the opinion of the court.

This suit was brought by the appellee for the specific performance of an option for the sale of a tract of land containing about sixty-eight acres. The trial court decreed

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specific execution, and from that decree this appeal was granted.

The option set up in the complainant's (appellee's) bill is as follows:

"Mt. Jackson, Va., March 11, 1911.

"Mr. C. E. Gudebrod,

"New York.

"My Dear Sir:

"Referring to the memorandum agreement I gave you this A. M. I notice your arrangement of the payment of the $60 M falls short $10 M, and if agreeable to you, may make this amount in two equal payments maturing in 300 and 360 days in keeping with the previous payments. Regarding other omissions made in our hastiness, viz., the sale of the 68 acres of land of mine lying opposite my orchard and immediately east of the R. R., I herewith grant you an option on it in connection with that given on my orchard at seventy-five (75.00) per acre on terms equivalent to cash, the growing crops reserved. Then as the season for seeding the orchard to clover, the spraying of the trees and the setting of fillers, &c., is at hand it must be understood that I am to be reimbursed with the expense of same, at cost, as incurred during the existence of the option. Awaiting your reply, I am

"Yours very truly,

"J. I. TRIPLETT."

The following is a copy of the "memorandum agreement" (which was also in the form of a letter) referred to in the paper upon which this suit is based:

"March 11, 1911.

"In consideration of one dollar paid to me, receipt of which is hereby acknowledged, I hereby give you thirty days option to purchase my orchard situated east of land

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owned by the Strathmore Orchard Company including 27 acres of land in Northwesterly part thereof including all improvements and containing in all about two hundred and twelve acres of land more or less, together with right to operate a ram for obtaining water during such time as water flows over the dam of the pond adjoining said property owned by me, together with all crops and labor performed on said property together with the ram and piping now connected with the water supply four mules and all tools and 3 wagons, implements of all kinds including 4 sets harness for the sum of Sixty thousand dollars, payable

$ 1,000 One thousand dollars in 30 days.
4,000 Four thousand dollars in 60 days.
5,000 Five thousand dollars in 120 days.
5,000 Five thousand dollars in 180 days.
5,000 Five thousand dollars in 240 days.
10,000 Ten thousand dollars Oct. 1, 1912—at 6 *per cent.*
10,000 Ten thousand dollars Oct. 1, 1913—at 6 *per cent.*
10,000 Ten thousand dollars Oct. 1, 1914—at 6 *per cent.*"

Within thirty days after these options were given the appellant and appellee entered into a contract for the sale and purchase of the 212 acre parcel of land, known as the "Orchard tract," upon terms somewhat different from those set out in the option under which it was acquired. After the agreement for the sale of the orchard tract had been signed by the parties, and on the same day, the appellee claims that he exercised his right to purchase the sixty-eight acre tract under his option on that tract and paid the appellant the sum of twenty dollars thereon, as shown by a receipt given by the latter in the following language: "Received of Mr. C. E. Gudebrod twenty dollars on option of 68 acres and acct."

As will be seen from the option given upon the 68 acre tract, it provides, among other things, that "as the season

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for seeding the orchard to clover, the spraying of the trees and the setting of fillers, &c., is at hand, it must be understood that I am to be reimbursed with the expense of same, at cost, as incurred during the existence of the option." It is a concession in the case that there was no orchard on the 68 acre tract.

The first question to be considered is whether or not the appellee accepted the offer for the sixty-eight acre tract upon the terms submitted in the option; or, in other words, whether or not the minds of the parties met in making and accepting the offer. The appellee claims that when he agreed under his option to purchase the sixty-eight acre tract, paid the twenty dollars and took the receipt therefor, his understanding of the matter, and his intention, was to pay $75.00 per acre for the land in cash, or its equivalent, and to pay twenty dollars additional on account of certain plowing, etc., that had been done on the sixty-eight acre tract during the existence of the option. The appellant, on the other hand, claims that his understanding of the matter, and his intention, was that he was to receive for the sixty-eight acre tract of land the price of $75.00 per acre in cash, or its equivalent, and the cost incurred by him in seeding the orchard tract in clover, spraying the trees and setting out fillers, amounting to about $500 during the thirty days the orchard tract option was in force.

After the receipt for the $20 had been given, the attorney of the appellant, who was present, was directed to prepare an agreement embodying the terms of sale and purchase. On the next day when the appellee returned to the office of the appellant to sign the agreement of sale, the parties differed as to that provision in the writing which provided for the payment of $500, the orchard account or claim of the appellant. The appellee refused to agree to pay that account, and the appellant refused to enter into an agreement for the sale of the sixty-eight acre tract unless the

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appellee did pay, or agree to pay, the orchard tract account, and the parties separated. Within the next thirty days the appellee, as he claims, made a tender of $5,085.75, the purchase price of the sixty-eight acre tract (67.81 acres) at $75 per acre. The appellant declined to receive the money. Thereupon the appellee made a special deposit of the same money, or the same amount of money, in bank. The language of the special deposit and the receipt of the bank therefor is as follows:

"*Memo. of instructions.*

"To the Shenandoah Valley National Bank of Winchester, Virginia.

"Winchester, Va.

"I, the undersigned, C. E. Gudebrod, herewith deposit as a special deposit the sum of $5,085.00 in gold coin of the United States, and seventy-five cents ($.75) silver coin of the United States, to be held by said bank under the following instructions:

"1. Pay over and deliver the same to said J. I. Triplett, or his order, upon delivery by him to said bank for C. E. Gudebrod of a deed conveying in fee simple to the said C. E. Gudebrod the tract of 67.81 acres of land laying near Mt. Jackson, in Shenandoah county, Virginia, covered by the option and letter dated March 11, 1911, free from all encumbraces, and with general warranty of title and covenant that the said grantor has the right to make a good and perfect conveyance thereof; and upon examination of said deed by the attorney of said C. E. Gudebrod.

"2. That upon the failure of said J. I. Triplett to deliver said deed then the said Shenandoah Valley National Bank shall pay over said fund to the clerk of the circuit court of Shenandoah county, Va., upon the institution of any suit by said C. E. Gudebrod hereafter against said J.

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I. Tripplett for enforcement of the contract with regard to said 67.81 acres of land, to be held by said clerk subject to the orders of the court in said suit.

"Given under my hand this 11th day of May, 1911.

"CHRISTIAN E. GUDEBROD."

"Winchester, Va., May 11, 1911.

"Received May 11, 1911, of C. E. Gudebrod a special deposit of $5,085.00 in gold coin of the United States, and seventy-five cents in silver coin of the United States, making in all the sum of $5,085.75, with the following instructions:

"(1) Pay over and deliver the *said* to said J. I. Triplett, or his order, upon the delivery by him to said bank for said C. E. Gudebrod of a deed conveying in fee simple to the said C. E. Gudebrod the tract of 67.81 acres of land lying near Mt. Jackson, in Shenandoah county, Va., covered by the option and letter dated March 11, 1911, free from all encumbrances, and with general warranty of title and covenant that the said grantor has the right to make a good and perfect conveyance thereof: and upon examination of said deed by the attorney of said C. E. Gudebrod.

"(2) That upon the failure of said J. I. Triplett to deliver said deed then the said Shenandoah Valley National Bank shall pay over said fund to the clerk of the circuit court of Shenandoah county, Va., upon the institution of any suit by said C. E. Gudebrod hereafter against said J. I. Triplett for enforcement of contract with regard to said 67.81 acres of land, to be held by the said clerk subject to the order of the court in said suit.

"Given under my hand this 11th day of May, 1911.

"JNO. W. RICE, *Cashier,*
"Shenandoah Valley National Bank,
"Winchester, Va."

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The appellant was notified of this action by the appellee. Upon the appellant's declining to comply with the terms and conditions of the special deposit, the money was turned over to the clerk of the court, when this suit was instituted, which was in June following.

According to the appellee's evidence, he never agreed to the terms of the option contract for the sale of the sixty-eight acre tract. He testifies that when the proposition was made to him to pay the cost of sowing clover seed, spraying, etc., on the orchard tract, whether made when closing the option on the orchard tract or when the option on the sixty-eight acre tract was accepted by him, he continuously and positively refused to entertain the proposition, and that the $20 paid on option of sixty-eight acre tract and account was made for plowing on that tract. The testimony of the appellant and his brother, who was present when the $20 was paid and the receipt given, is equally positive that the "account" referred to in that receipt was for labor performed on the orchard tract.

The weight of evidence is in favor of the appellant's contention on this question. He and his brother sustain it. The appellee alone testifies to his understanding and intention when he paid the $20 and took the receipt. The receipt itself tends to sustain the appellant's view. It shows that the $20 was paid and received "on the option of the sixty-eight acre tract and acct." There was no option on that tract except that which provided for the plaintiff's reimbursement of the expense incurred on the orchard tract. In the absence of parol evidence, the natural if not the necessary meaning to be placed upon the receipt is that the $20 was paid on account provided for in the option on the sixty-eight acre tract. Without the appellant's assent the appellee could not acquire the sixty-eight acre tract, except upon the terms contained in the option. The fact that the labor, etc., the payment of which was provided for

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in the option, related to the orchard tract could not, as it seems to us, affect the question. The appellant had the right to impose such terms and conditions in that option as he saw proper. Indeed, it appears that the principal object the appellant had in writing the letter of March 11, 1911, giving the option on the sixty-eight acre tract was to secure the payment of the expense, which he testified he knew had to be, or should be, incurred in caring for the orchard tract during the existence of the option upon it. The option on the orchard tract, as prepared by the appellee not only did not provide for the payment of that expense, as the appellant claims it should have done, but used language which excluded that item of expense in the purchase price of the land. This fact the appellant claims he did not know when he signed the option on the orchard tract. That paper shows on its face that it was prepared hurriedly, as does the parol evidence, certainly without much care, for it wholly fails to make provision for the time when the last ten thousand dollars of the purchase price was to be paid, or to make any reference to the sixty-eight acre tract, which both parties seem to have considered had some connection with the orchard tract in their offers to buy and sell. It is true that when the terms of the agreement for the sale and purchase of the orchard tract were being considered, the item of expense for labor, etc., was mentioned, and the appellee refused to pay it. This, under the terms of his option on that tract, he clearly had the right to do, but when he determined to accept or take up the option on the sixty-eight acre tract, he could not accept it upon any other terms than those which the option contained. He did not at the time he claims to have accepted the option offer or agree to pay the labor, etc., account; and he did not do so when he made the tender of the purchase price of the sixty-eight acre tract, nor when he made the special deposit of the money so tendered in

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bank, nor when he filed his bill. On the contrary, the conduct of the appellee, as well as his words, clearly shows that he not only never offered or agreed to pay the labor, etc., account, whose payment was required by the terms of the option, but that he had no intention of doing so. The appellee never having accepted the terms of the option which gave him the right to purchase the sixty-eight acre tract of land, he was not entitled to a specific execution thereof, and the trial court erred in so holding.

The decree complained of must be reversed, and the bill dismissed, with costs to the appellant, subject to a credit of $20, the amount paid by the appellee to the appellant as evidenced by the receipt of April 10, 1911.

Reversed.

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Richmond

YATES v. YATES.

November 20, 1913.

1. DIVORCE—*Desertion—Case in Judgment—Jurisdiction Declined.*—The trial court properly refused to entertain a suit for divorce (on the ground of desertion) brought by the husband, where it appeared that the native domicile, as well as the matrimonial domicile, of the parties was the District of Columbia, to which the plaintiff goes daily as a sleeping car conductor; that he proceeded against his wife by order of publication, and gave her no other notice of depositions taken in the city of Washington or elsewhere; that the affidavit for the order of publication was fatally defective, and no order of publication has been produced and filed in the cause, or noticed by the clerk, and there has been no appearance by the wife, by counsel or otherwise; that the defendant is a non-resident of the State; that the parties never cohabited in this State, and the evidence does not establish a *bona fide* residence of the plaintiff in the county in which the suit was brought.

Appeal from a decree of the Circuit Court of Rockingham county. From a decree refusing to take jurisdiction, the complainant appeals.

Affirmed.

The opinion states the case.

Charles A. Hammer, for the appellant.

No appearance for the appellee.

KEITH, P., delivered the opinion of the court.

John C. Yates filed his bill in the circuit court of Rock-

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ingham county, charging that his wife had deserted him for more than three years prior to the institution of the suit, and that she is now a non-resident of Virginia. The defendant was not served with process, and did not appear or plead in person or by attorney. Depositions were taken to prove the allegations of the bill, and when the case came on to be heard the circuit court entered the following decree:

"For reasons expressed in writing and filed with the papers of the cause as part of the record, the court declines to entertain jurisdiction of this cause and the same is dismissed from the docket of the court."

The opinion of the court referred to in the decree is in part as follows: "The native domicile of these parties, plaintiff and defendant, was the District of Columbia, which was also the matrimonial domicile. The defendant is still a resident in the District of Columbia. The process was served on the defendant by order of publication, and there has been no appearance by defendant. . . . The defendant claimed to be domiciled at Harrisonburg. He testifies that he resided in Alexandria from June, 1908, shortly after the separation with his wife in Washington, until December, 1911, when he became a resident at Harrisonburg. He is a pullman car conductor. There is but one pullman car running to Harrisonburg, and that one runs between Harrisonburg and Washington city, leaving Harrisonburg at 6:40 a. m. and leaving Washington city on the return trip about four o'clock in the afternoon and getting back to Harrisonburg at nine P. M. What kind of a domicile the plaintiff has established at Harrisonburg or what caused him to establish a domicile there, he does not say. He does say, though, that Harrisonburg became his place of residence in December last, and the record shows that he commenced this suit for a divorce in January. In his deposition he gives the exact place of residence of his

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wife in Washington city, but he proceeded against her by order of publication, though it would have been cheaper and quite as effectual, under our statute, to give her personal service of notice by an officer in the District of Columbia. He took depositions in Washington city, where his wife lives, but without notice to her, resting upon the sufficiency of the order of publication. He brings his mother and father from their home in Alexandria to Harrisonburg to testify as witnesses in his behalf, though it would have been as convenient for them to take their depositions at their place of residence, and probably more economical also.

"The court considers the fair inferences and implications from the facts stated to justify the conclusion that the plaintiff has sought this jurisdiction for the purpose of getting as far away from his wife as possible and of concealing his suit from her, and that he has come to this jurisdiction for the purpose of bringing this suit and that he has not established a *bona fide* domicile in this county.

"The court will decline jurisdiction and dismiss the suit. Besides the reasons already mentioned for refusing to entertain jurisdiction of the cause, it may be further pointed out that the affidavit on which the order of publication was based is unintelligible and therefore insufficient."

To these reasons moving the circuit court, we may add that there is no order of publication before us at all. There is a statement made by the notary public in the caption to the depositions taken by him on the 16th day of March, 1912, that the defendant had been proceeded against as a non-resident, and the order of publication against her had duly matured; but there is not one word from the clerk, the order of publication itself is not before us, there is no appearance of defendant by counsel, in person or otherwise, and the decree does not state upon what papers the cause was heard in the circuit court.

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The statute fixing the jurisdiction of courts in matters of divorce is found in section 2259 of the Code: "The circuit and corporation courts, on the chancery side thereof, shall have jurisdiction of suits for annulling or affirming marriages, and for divorces. No suit for annulling a marriage or for divorce shall be maintainable, unless one of the parties has been domiciled in this State for at least one year preceding the commencement of the suit; nor shall any suit for affirming a marriage be maintainable, unless one of the parties be domiciled in this State at the time of bringing such suit. The suit, in either case, shall be brought in the county or corporation in which the parties last cohabited, or (at the option of the plaintiff) in the county or corporation in which the defendant resides, if a resident of this State, and if not a resident, in the county or corporation in which the plaintiff resides."

It seems that the parties never cohabited in this State; that the defendant is a non-resident of the State; and that the plaintiff claims a residence in Rockingham county, under the circumstances which we have already stated.

We agree with the circuit court that it properly refused, under the facts appearing in this case, to grant the decree prayed for. Its order refusing the divorce is affirmed.

Affirmed.

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Richmond

YELLOW POPLAR LUMBER COMPANY v. GOBLE.

November 20, 1913.

Absent, Keith, P.

1. MASTER AND SERVANT—*Personal Injury—Negligence—Accident.*—Negligence of the master cannot be inferred from the mere occurrence of an accident by which his servant is injured. That fact alone does not raise even a *prima facie* presumption that the master has been guilty of negligence or a breach of duty to his servant. Negligence of the master is an affirmative fact to be established by the injured servant.
2. MASTER AND SERVANT—*Negligence of Master—Evidence—Unforeseeable Event—Case at Bar.*—Negligence must be established by affirmative evidence, which must show more than a mere probability of a negligent act. The existence of negligence must not be left wholly to conjecture, and, in determining whether or not an act or omission of the master was negligent, it must be borne in mind that the master is not compelled to foresee and provide against that which reasonable and prudent men would not expect to happen. In the case at bar, the injury complained of could not have been anticipated and provided against by a reasonably prudent man, but was a pure accident. The plaintiff was injured by a blast of which he had ample warning and from which he had ample opportunity to escape, but took refuge in a place which he regarded as safe, and was injured in consequence of a peculiar rebound of a stump blown out by the blast, and hence cannot recover.

Error to a judgment of the Circuit Court of Dickenson county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

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J. C. Smith, W. H. Rouse and *E. M. Fulton,* for the plaintiff in error.

Sutherland & Sutherland and *Chase & Daugherty,* for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This action was brought to recover damages for personal injuries alleged by the plaintiff, Frank Goble, suing by a next friend, to have been sustained by him as a result of the negligence of the defendant, the Yellow Poplar Lumber Company. There was a verdict and judgment in favor of the plaintiff, which this writ of error brings under review.

In the view we take of the case it is only necessary to consider the last of the several assignments of error, which calls in question the action of the trial court in refusing to set aside the verdict as contrary to the law and the evidence.

It appears from the record that the plaintiff, a well developed youth at least nineteen or twenty years of age and of average intelligence, sought and obtained employment with the defendant company in its work of constructing a tram or logging road on Russell Prater creek, in Dickenson county. He was a man in size and appearance, and was, therefore, presumably, capable of knowing and appreciating the dangers of the work in which he thus obtained employment, and he had worked for the defendant company a year before on like work upon another creek, and had been working at this particular place where he was injured about three days. The work of building this tram road consisted mainly in first digging and blasting out the material, so as to make the road bed, then in putting down the stringers and other superstructures. The work of making the road bed was necessarily to be done first, and was

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followed by the laying of the stringers, etc., so as to make a complete superstructure over which logging trucks or cars were to be run, and the work of construction required a grading force or crew, a blasting crew, and behind them a stringer crew.

The plaintiff's employment was with the stringer force, and on the occasion of the injuries to him he had been at work with this force some distance behind, but in plain view of the place where the grading force were at work, and where the blast under a stump, which caused his injuries, was let off, of which timely notice and warning were given to him as well as to all others engaged in the work who might be or remain in a place of danger by reason of the blast. This blast was to be let off about six o'clock p. m., "quitting time," and the foreman of the grading crew, Ed. England, sent two men down to the point where the stringer crew was to tell them that the blast was to be let off, and all hands should get "plum out of the way." It was an established custom in such conditions to give the alarm of "fire" (which plaintiff clearly understood meant that a blast was to be set off), and when given the cry was taken up and repeated by others; and it was also the well established rule of the defendant company (known to all engaged in the work) that upon the alarm of "fire" being given, all employees were to see that every one was gotten out of danger. With every crew engaged in this work there was a foreman and a number of other laborers of long experience, one Orville Belcher being the foreman of the stringer crew with which the plaintiff was at work. Ample time to get out of the way of danger from said blast was unquestionably given and the warning, "fire," was taken up and repeated by others, including one Tackett, another workman engaged with a grading crew further down the creek from where Belcher's crew had been at work, and it is upon this repetition of the alarm by Tackett that the

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plaintiff mainly relies for a recovery of damages in this action, since it is practically conceded that there was no cause of complaint of the conduct of England or his men."

Tackett's deposition was taken on behalf of and read in evidence by the plaintiff, and the reason for repeating the alarm is thus stated by him:

"Q. Why did you holler fire?

"A. There were fellows below us coming up that way. I knew they were going to shoot up there and didn't know whether they heard them or not."

All of the witnesses for the plaintiff as well as for the defendant company testify that according to the established rules governing the conduct of this work, employees engaged therein were to run and get away as fast as possible when notice that a blast was to be set off was given, or the alarm, "fire," heard; and that it was from four to five minutes after such notice or alarm was given until the blast would go off. The grading crew to which Tackett belonged were working in sight of plaintiff's crew the day of the accident to him, and there had been no blasting by Tackett's crew on that day, or within three or four days before. When England, who had been in charge of the blasting crew at work up the creek from where the plaintiff's crew were at work, had "sent two men down the line to tell everybody to get out of the way," and had seen Belcher's men (including the plaintiff) quit work, hang up their tools and start away before he left the stump that was to be blown out, came on down the line to about where Belcher's crew had been working, and then crossed over the creek, giving the signal to set fire to the blast just as he crossed over, and then went on till he reached a public road, a safe distance away and about two minutes before the blast went off. The creek was somewhat swollen from a recent rain, but there was little or no trouble in crossing it as England did. Some of plaintiff's witnesses who at

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the time had been working with England's crew came down the line of work and along with the plaintiff and others got under a cliff, or shelving rock (called the "Goble cliff"), where they considered themselves safe. Belcher got out from under a rock where he first stopped and sought shelter thirty-five feet lower down, and asked the men under the "Goble cliff" to come down to where he was, but "they said they were all right." These men under the "Goble cliff" had not only ample time to have gone to where Belcher was before the blast went off, but could have gone on 350 or 400 yards further away and beyond all possible danger.

The distance from the blast to where plaintiff had been at work was about 410 feet; from the cliff where plaintiff sought safety to the cliff under which Belcher, his foreman, and others stopped, was about 39 feet; from the cliff under which the plaintiff took shelter to the end of the spur where Tackett repeated the alarm of "fire" was 169 feet; and from the log drift in the creek over which England passed, just above where plaintiff had been at work, across through a bottom and up the hillside to the county road 455 feet. Plaintiff himself states that Tackett's crew "was working in sight that day and there had been no blasting;" and that he had passed up and down the creek two or three times that day before being hurt. He further states that "he was entirely under the rock ('Goble cliff') but the stump bounced under and hit him." Other witnesses for the plaintiff who were with him at the time say that they got under the "Goble cliff" because they thought it safe, and the time fixed by them that they were under this cliff before the blast went off was about five minutes.

When the blast went off, the stump, under which it had been placed and fired, was blown into the air, and upon coming to the earth hit on the top or side of a cliff and

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caromed under it, striking and injuring only the plaintiff and that part of his body, viz., his legs, which were not fully protected by the overhanging cliff.

The foregoing are the salient facts shown in the evidence certified in the record, considered under the rule governing its consideration by this court, and upon which the defendant company is charged with negligence in causing the injury for which compensation is sought in damages.

The essential grievances stated in the declaration are that the defendant company failed to provide a suitable and safe place for the plaintiff to work; that sufficient rules and regulations had not been adopted by the company and enforced for the protection of the plaintiff while engaged in the work.

The evidence proves nothing in the situation to suggest danger to any one engaged in the defendant company's work at the time and on the occasion of the accident to the plaintiff which had not been duly guarded against by well known rules governing employees engaged in carrying it on, and as remarked, his right to a recovery in this action must rest alone upon the theory that the repetition of the alarm, "fire," by Tackett confused the plaintiff and others, which caused them to seek shelter under the "Goble cliff" and not try to get further away from danger. No one knew better than the plaintiff, as his statement shows, that no blast had been prepared by Tackett's crew that day, and it is, therefore, inconceivable that he could have been confused by Tackett's repetition of the alarm given by England's men, and which Tackett, prompted by the dictates of humanity, repeated to those whom he saw approaching from below, and that too upon the most reasonable assumption by Tackett, that those to whom his warning was directed had not heard the cry of "fire" that had been put out by England and his men; and there was not the slightest reason for him to suppose that this act of his would

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be misinterpreted by any one, especially as the stringer crew could see where he had been at work and in the ordinary course of events would know, by observation, that there was no blast to be let off by his crew; certainly, that there was no blast to be let off by him or his crew without, in accordance with the established rules of the company, sending some one up the line of work to give warning, as England had done.

It is inconceivable, as it appears to this court, that any management could have anticipated that an employee engaged in the work, as was the plaintiff, would become panic-stricken under such circumstances, and the fact, as disclosed by the plaintiff's own statement, is that he was not panic-tsricken or confused by Tackett's cry of "fire" and thus prevented from seeking protection elsewhere than under the "Goble cliff," but stopped where he did because he considered it safe to do so. It was clearly not for the want of time that the plaintiff got no farther away from the blast. England, after sending out notice of the impending blast had crossed the creek and gone 455 feet, 150 yards, and over, out into a public road, and Belcher had gotten out from under the rock where he first stopped and gone farther away and could have gone 350 or 400 yards farther before the blast went off; therefore the plaintiff remained, as did others, under the "Goble cliff," not because of the want of time to go elsewhere and farther away, but because they considered themselves fully protected, and they were, with the exception of the plaintiff, who was injured by an occurrence which could not have been foreseen or expected to happen by the exercise of ordinary or even extraordinary care.

It has been over and over repeated in the decided cases in this and other courts, that the negligence of the master cannot be inferred from the mere occurrence of an accident by which his servant is injured. That fact alone does not

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raise even a *prima facie* presumption that the master has been guilty of negligence or a breach of duty to his servant. Negligence of the master is an affirmative fact to be established by the injured servant.

"Negligence must be established by affirmative evidence, which must show more than a mere probability of a negligent act. The existence of negligence must not be left wholly to conjecture, and, in determining whether or not an act or omission of the master was negligent, it must be borne in mind that the master is not compelled to foresee and provide against that which reasonable and prudent men would not expect to happen." *N. & W. Ry. Co.* v. *Witt,* 110 Va. 117, 65 S. E. 489; *N. & W. Ry. Co.* v. *McDonald,* 106 Va. 207, 55 S. E. 554, and authorities cited.

Our view of the evidence in this case is that it only shows that the plaintiff's injuries resulted from a pure accident that was not to be anticipated or provided against by reasonably prudent men, and for which injuries the defendant company cannot be held liable.

The judgment complained of must, therefore, be reversed, the verdict of the jury set aside, and the cause remanded for a new trial thereof, if the plaintiff be so advised, to be had not in conflict with the views expressed in this opinion.

Reversed.

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Syllabus.

Richmond

BOWLES' ADMINISTRATOR v. VIRGINIA SOAPSTONE COMPANY.

January 15, 1914.

1. EVIDENCE—*Precautions After Accident—Inspection of Mines.*—It is not permissible for the purpose of showing a negligent injury to show that a mine was inspected more frequently after the accident complained of than before. Evidence of subsequent repairs or precautions taken after the happening of the accident causing the injury is not admissible to prove antecedent negligence.
2. EVIDENCE—*Relevancy—Death by Wrongful Neglect.*—In an action for death by negligence, a conversation between witnesses and deceased to the effect that he was well pleased with his position and regarded it as the best job he ever had is wholly immaterial to the issue.
3. EVIDENCE—*Experts—Data for Opinion.*—An expert cannot be asked whether he would regard it as safe to rely on pins to hold in position a mass of stone from fifty to sixty feet long and from twenty to thirty feet wide. The weight and dimensions of the stone which in fact fell could not have been known until after it fell, and could not have been made the subject of a hypothetical question to a witness however expert he may have been.
4. MASTER AND SERVANT—*Safe Place—General Practice of Others—Individual Practice.*—In determining the question whether or not the master has exercised ordinary care in providing a reasonably safe place for the servant to work, the general practice of employers in similar lines of employment is admissible in evidence, but the act of a particular corporation or individual cannot be introduced to show that the master has or has not exercised that degree of care which the law requires in such case.
5. MASTER AND SERVANT—*Mines—Method of Work—Knowledge of Servant—Common Knowledge.*—In an action to recover for the negligent death of a miner killed by stone and earth caving in on him while at work in the mines, it was not to the prejudice of the plaintiff that the defendant was permitted to show that the method adopted by the defendant of pinning up the cracks in the

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walls, and of inspecting the walls, was a matter of general knowledge among all of the employees of the defendant engaged at that place, and was generally and commonly known.

6. MASTER AND SERVANT—*Safe Place—General Custom—Stone Quarry—Case at Bar.*—The evidence in the case at bar shows that the use of iron pins put into the walls or sides of a stone quarry along the lower edge of a seam discovered in said walls, as a means of supporting the walls and preventing the fall of stone, was sanctioned by general custom as a sufficient precaution against the fall of stone under the conditions existing at the time of the accident under investigation, and, together with other precautions taken to keep the mine in a reasonably safe condition, further shows that the defendant discharged the duty imposed upon it to use reasonable care to furnish and keep a place reasonably safe for the performance of the duties committed to its employees.

7. MINES AND MINERALS—*Seam—Crack.*—A seam, in mining, is a thin layer or stratum, a narrow vein between two thicker strata. It differs from a crack because there is no actual parting of the substance in which the seam appears, though a seam may develop into a crack.

8. MASTER AND SERVANT—*Safe Place—Mines—Quarries.*—An employer is not an insurer of the safety of the employee. His duty is performed if he exercises reasonable care to provide a reasonably safe place in which the employee is to do his work, and exercises reasonable care and supervision to see that a reasonable condition of safety is preserved. These principles apply with peculiar force to mines and quarries, for in them conditions are never at rest. Everything is in a condition of change, so that both the employer and the employee must be upon the alert to guard against danger.

9. EVIDENCE—*Experts—Reasons for Opinions.*—Expert testimony is a useful and necessary adjunct to the administration of justice, and a capable expert can often throw light upon dark places; but the force of expert testimony must, after all, in large measure, depend upon the reasons that the witness is able to give for the opinions which he expresses.

10. MINES AND MINERALS—*Cracks in Walls—Inspection—Sounding.*—Inspection by sounding to ascertain the extent and danger attending the presence of a crack in a stone quarry seems to be the usual and customary method observed in such case. While not infallible, yet, in the endeavor to ascertain conditions that are inaccessible to sight or touch, the sound that is given back by a blow upon the surface of the rock is the safest means of

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ascertaining whether it is a solid mass or is interrupted by a seam or crack.

11. MINES AND MINERALS—*Quarries—Cracks—Securing by Pins—Customary Method.*—Pins such as were used in the case at bar are in general use where a seam is disclosed in the walls of a quarry and are relied upon by those engaged in quarrying—not that they afford an absolute assurance of safety, but that in dealing with unknown conditions experience has shown that they are usually an efficient aid in promoting safety.

12. MINES AND MINERALS—*Quarries—Cracks—Test of Core Drills.*—A core drill is a hollow cylinder armed with black diamonds which is made to revolve with great rapidity, with the result that when driven into a stone surface a core is found in the midst of the cylinder, and the theory is that by taking out a core it will show the constitution of the mass from which it is taken and whether seams or cracks exist in it. But fractures in the core are often produced by the operation of the drill itself, and hence it is not an infallible test of the condition of the mass.

Error to a judgment of the Circuit Court of Nelson county in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Caskie & Caskie, for the plaintiff in error.

P. H. C. Cabell and *Coleman, Easley & Coleman,* for the defendant in error.

KEITH, P., delivered the opinion of the court.

Nathaniel Bowles came to his death by a fall of stone in the Virginia Soapstone quarry, his administrator brought suit to recover damages, and the jury rendered a verdict in his favor for $6,000, subject to the judgment of the court upon the defendant's demurrer to the evidence. The court rendered judgment for the defendant, and the case is now before us upon a writ of error.

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The declaration contains two counts, the first of which states that the defendant was in the possession and operation of a quarry, which it had sunk to a depth of two hundred feet below the surface, and had negligently and unskillfully left the sides or walls of the quarry, which are composed of rock, soapstone or earth, so steep and precipitous that any stone or earth in the sides or walls which might become loosened, as was liable and likely to happen at any time by the jar and vibration caused by the work in the quarry, and the result of the usual and common processes of nature, would necessarily fall upon the bottom or floor of the quarry, and upon any person or persons who might be in the quarry, and although the defendant had been in possession of and operating the said quarry for ten years, it had nevertheless negligently and carelessly permitted the sides or walls of the said quarry to remain in the dangerous and perilous condition aforesaid.

The second count charges that it was the duty of the defendant to keep and maintain the walls and sides of its quarry, which were of great height and very abrupt, clear of loose rock, or of such rock, stones and debris as were liable to fall down and injure or kill its servants while at work in the said quarry; "and said plaintiff says that the said defendant disregarded its duty in this behalf, and carelessly, wilfully and negligently failed to keep its said quarry in a reasonably safe condition, and left rocks or stones in the walls or sides of said quarry, loose and in such condition that they were liable to fall from their positions on the servants of the defendant below, while they were at work in the said quarry for the said defendant for hire, and that said defendant carelessly left a certain mass or body of stone or earth in such condition in the walls or sides of its said quarry that it was liable at any time to fall out of its place and down upon the servants of the said defendant, while they were at work in the said quarry, and

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to injure and kill them, of all of which the defendant company had notice and especially had notice of the dangerous condition of the mass of rock or earth aforesaid, whilst the dangerous condition of said quarry and the danger from the mass or body of rock aforesaid was unknown to the plaintiff's intestate."

Each count then charges that by reason of the negligence alleged a mass of rock fell, struck the plaintiff's intestate and inflicted upon him injuries from which he died.

During the progress of the trial numerous objections were taken to rulings of the court in the admission of testimony, which are assigned as error.

The first bill of exceptions is to the action of the court in refusing to allow a witness on behalf of the plaintiff to testify that the inspection of the walls of the quarry was much more frequent after Bowles was killed than before.

The question here presented is in principle similar to that decided by this court in *Va. & N. C. Wheel Co.* v. *Chalkley,* 98 Va. 62, 34 S. E. 976, where it was held in an action by a servant to recover damages for an injury, that evidence of repairs to machinery after the injury is not admissible to show negligent failure to repair before the injury. A number of cases are there cited, among them *Morse* v. *Min. & St. L. Ry.,* 30 Minn. 465, 468, 16 N. W. 358; *Columbia R. Co.* v. *Hawthorne,* 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405, and numerous others, to which may be added the law as stated by Thompson in his Commentaries on the Law of Negligence, section 7871, where it is said: "It is now settled by the weight of authority as well as reason that evidence of subsequent repairs or precautions taken after the happening of the accident causing the injury is not admissible to prove antecedent negligence."

The assignment of error based upon the second bill of exceptions is to the exclusion of a conversation had between witnesses and the deceased in which he had ex-

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pressed himself as well satisfied with his position and regarded it as the best job he had ever had.

We cannot conceive that this evidence could have had the slightest probative value in behalf of the plaintiff and its admission or rejection were wholly immaterial to the issue before the jury.

Bill of exceptions No. 3 is to the refusal of the court to allow a witness to testify that after the accident the company put other pins in the walls, and that the foot wall of the quarry had after the accident caved in for the distance of from thirty to fifty feet, as a result of which the quarry had to be abandoned. This ruling is covered by what we have already said with reference to the first bill of exceptions.

Bill of exceptions No. 4 is to the action of the court in refusing to allow a witness to testify as to whether he would regard it as safe to rely on pins to hold in position a mass of stone from fifty to sixty feet long and from twenty to thirty feet wide. This question submitted to an expert for his opinion a condition of facts which could not be known until after the occurrence of the accident. The event is always a great teacher. The Nevada, 106 U. S. 154, 1 Sup. Ct. 234, 27 L. Ed. 149. The mass of stone which actually fell weighed many hundreds of tons, in the opinion of some of the witnesses who testified, but its weight and dimensions were not known until the mass actually fell and could not be made the subject of a hypothetical question to a witness, however expert he may have been.

Embodied in the same bill of exceptions No. 4 is an objection to the ruling of the court excluding the testimony of a witness to the effect that when he went to the Piedmont quarry he found one of the walls pinned up; that he worked there for two or three months when it was discovered that a mass of stone forming a part of the foot-wall was giving way, whereupon he took the men and machines out of the quarry and proceeded to blast down the wall.

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This action of the court was clearly in accordance with the law in such cases.

In *Bertha Zinc Co.* v. *Martin*, 93 Va. 871, 22 S. E. 869, 70 L. R. A. 999, it was held that "it is the duty of a master to exercise ordinary care, that is, such care as reasonable and prudent men use under like circumstances, in providing safe and suitable appliances and instrumentalities for the work to be done, and in providing generally for the safety of the servant in the course of his employment, regard being had to the work and the difficulties and dangers attending it. He is not bound to provide the latest inventions, nor the most newly-discovered appliances. The master is not required to use more than ordinary care no matter how hazardous the business may be in which the servant is engaged. Ordinary care depends on the circumstances of the particular case, and is such care as a person of ordinary prudence, under all the circumstances, would exercise. This is to be ascertained by the general usages of the business. The master is not held to any higher degree of skill than the fair average of his profession or trade. He is not an insurer of the safety of his servants and is liable for the consequences, not of danger, but of negligence."

In section 7776, Thompson on Negligence, it is said that "On the question whether the employer has exercised reasonable and ordinary care in providing and maintaining safe appliances and places for work, the plaintiff may show the general practice of other employers in similar lines of employment in these respects."

In the case before us the effort was not to show a general practice of other employers, but a specific act of an individual engaged in quarrying stone under conditions wholly different from those which are here presented.

The fourth objection embraced in the fourth bill of exceptions is because the court allowed A. H. Lloyd to tes-

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tify as to the general custom in soapstone quarries throughout the United States in reference to the prevention of the falling or sliding of walls. This ruling of the court was clearly within the law as stated in the case of *Bertha Zinc Co.* v. *Martin, supra;* and taken as a whole the ruling of the court upon this bill of exceptions properly illustrated the rule and its exception—that the general practice of employers in similar lines of employment is admissible, while the act of a particular corporation or individual cannot be introduced to show that the master has or has not exercised that degree of care which the law requires in furnishing a reasonably safe place for the performance of the duties assigned to his employees.

The fifth bill of exceptions is to the action of the court in permitting witnesses to testify that the method adopted by the defendant of pinning up the cracks in the walls, and of inspecting the walls was a matter of general knowledge among all of the employees of the company engaged at that place, and was generally and commonly known. The objection to this evidence is that "it could only tend to confuse." In what way it tended to confuse is not pointed out, nor is it apparent to the court. Whether or not the pinning up of the cracks and inspecting of the walls was a compliance with the duty imposed upon the defendant of furnishing a reasonably safe place for the doing of the work assigned to its employees, is the question at issue. That the methods employed were matters of common knowledge could not be injurious to the plaintiff, and must, indeed, have been somewhat to his advantage, as affording the greatest scope for investigation into their efficiency. We do not perceive that there was any error in this ruling to the prejudice of the plaintiff.

The seventh bill of exceptions is to the action of the court in striking out certain evidence. This evidence, as stated in the petition, pertained to the method of quarrying,

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the use of pins, as to what cracks indicated and the course to be pursued where the cracks or seams were discovered, the use of dynamite in blasting in the quarry, and the use of a diamond core drill in ascertaining the extent and danger resulting from cracks.

Referring to the declaration in this case, it appears that the negligence charged in the first count is "that the quarry had been driven to a depth of about 200 feet, and that the sides or walls thereof, which were composed of rock, soapstone or earth, were so steep and precipitous that any stone or earth in the sides or walls which might become loosened, as was liable and likely to happen at any time by the jar and vibration caused by the work in said quarry, and the result of the usual and common processes of nature, would necessarily fall upon the bottom or floor of the quarry and upon any person or persons who might be in said quarry." It is obvious that the wrong here complained of is that the sides or walls of the quarry were left too steep or precipitous, so that stone which became loosened, as was liable and likely to happen by the jar and vibration of the work in the quarry, and the result of the usual and common processes of nature, would fall. There is not a suggestion of a want of care or skill in the conduct of the work of the quarry other than the form in which the walls were left, as being too steep and precipitous. The inference plainly is that, although the work was conducted in the usual and proper manner, the unskilful method by which the quarry had been excavated, as a result of which the walls had been left as described in the declaration, controlled and dominated the situation, so that from this initial fault the whole sequence of events followed which culminated in the fall of rock and the injuries to plaintiff's intestate. Quarrying cannot be carried on without jar and vibration, however skilfully done, nor can the result of the usual and common processes of nature always be obviated by any degree of care.

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The second count in the declaration is that the defendant wilfully and negligently failed to keep its quarry in a reasonably safe condition, and left rocks or stones in the walls or sides of the quarry, loose and in such condition that they were liable to fall on the servants of the defendant below.

The condition of the record is such that we cannot deal satisfactorily with the many objections stated in bill of exceptions No. 7, except in a general way. Some of the objections can be disposed of by what we have already said with respect to the two counts of the declaration, which make no charge as to the method of quarrying save that already specifically mentioned, but admitting that under its general terms the plaintiff could have challenged the use of pins as a sufficient precaution under conditions which were present at the time of the acident, we are of opinion that the evidence shows that their use was sanctioned by general custom, and in connection with frequent inspections which were made by sounding the face of the quarry with large hammers or crowbars and by a careful examination by the eye of all superficial appearances, that the defendant discharged the duty imposed upon it to use reasonable care to furnish and keep a place reasonably safe for the performance of the duties committed to its employees. *Cranes Nest C. & C. Co.* v. *Mace,* 105 Va. 624, 54 S. E. 479.

The quarrying of stone, and it seems especially of soapstone, is a hazardous business. The elements of danger cannot be wholly eliminated by the utmost care. A quarry cannot be conducted without blasting and the use of machinery which causes vibration. In the case under consideration, after they had gone down some distance into the earth, perhaps sixty feet, a seam was discovered, running in a general way parrallel to the floor of the quarry. A *seam* is defined to be, in mining, "a thin layer or stratum, a

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narrow vein, between two thicker strata." It differs from a crack because there is no actual parting of the substance in which the seam appears, though a seam may develop into a crack. The evidence shows that the seam in question was so narrow as only to admit of the entrance of a thin knife blade. Soon after it was discovered a little sand, or gravel, or clay, fell from this seam, with the result that those in charge put iron pins along the lower edge of the seam. These pins were from an inch and a half to two and a half or three inches in diameter, and some of them as much as seven feet in length. The quarrying continued and was carried down to a considerable distance, when three or four years after the discovery of the first seam another seam, running in a general way parallel to the first and of the same character, was discovered. Pins were introduced along the lower edge of this seam. During all the time frequent and careful inspections were made of the face of the wall, and it was sounded with heavy hammers and crowbars. There is no evidence of the slightest character of any movement of the stone or anything to indicate that any movement was to be apprehended, save and except what we have stated,—the appearance of the first seam, the falling of a little material from it, and after the lapse of three or four years the discovery of a similar seam sixty feet below the first one, with no evidence of any connection between the two seams. After the discovery of the second seam and the introduction of the pins, the quarrying continued for something like a year, and still there was nothing to indicate danger, when suddenly, without warning, a great mass of stone fell and inflicted injuries from which plaintiff's intestate died.

It must always be borne in mind that the employer is not the insurer of the safety of the employee. His duty is performed if he exercises reasonable care to provide a reasonably safe place in which the employee is to do the work,

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and exercises reasonable care and supervision to see that a reasonable condition of safety is preserved. These principles apply with peculiar force to mines and quarries, for in them conditions are never at rest; everything is in a condition of change; so that both the employer and the employee must be upon the alert to guard against danger.

The contention of plaintiff in error could not be satisfied short of making the employer the insurer of his servant's safety. He earnestly insists that the use of pins, of sounding and of inspection were insufficient. The only method he suggests as better than that adopted is the use of the diamond core drill to ascertain the extent and danger of cracks.

Expert testimony is a useful and necessary adjunct to the administration of justice, and a capable expert can often throw much light upon dark places; but the force of expert testimony must, after all, in large measure depend upon the reasons that the witness is able to give for the opinions which he expresses. Some of the expert witnesses of plaintiff in error testify that inspection by sounding is the only mode by which can be ascertained the extent and danger attending the presence of a crack in a stone quarry, and that seems to be the usual and customary method observed in such cases—not that it is infallible, not that it always produces satisfactory results and leads to accurate conclusions; but that, in the endeavor to ascertain conditions that are inaccessible to sight or touch, the sound that is given back by a blow upon the surface of the rock is the safest means of ascertaining whether it is a solid mass or is interrupted by a seam or crack. As to the use of pins, the evidence is that they are in general use and are relied upon by those engaged in the business of quarrying—not that they afford an absolute assurance of safety, but that in dealing with unknown conditions experience has shown that they are usually an efficient aid in promoting safety.

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It is objected to their use that unless they pass through that portion of the rock which is in danger of falling into the solid mass beyond, they furnish no support, and this is true. How then can it be determined whether the pin has or has not passed through that portion of the rock which is prone to fall and into the solid mass beyond? The plaintiff in error insists that this can be accomplished by the core drill. The core drill is a hollow cylinder armed with black diamonds (Webster's Dict.), which is made to revolve with great rapidity, with the result that when driven into a stone surface a core is found in the midst of the cylinder, and the theory is that by taking out a core it will show the constitution of the mass from which it is taken, and whether seams or cracks exist in it. Theoretically this may be true, but when it is suggested that by force of the revolution of the cylinder the core is often broken, though no crack or seam be present in the stone, and that the edges of the core will be so worn and abraded by the rapid revolution of the drill as to render it impossible to distinguish between a fracture existing in the rock where the core drill was applied and fractures in the core produced by the operation of the drill, the result is so natural, so conformable to reason, that the statement of it carries conviction with it; so that the core drill becomes equally as fallible as the sounding hammer in disclosing the secrets that lie hid in a mass of stone.

It would seem, therefore, that there is no method by which safety can be insured short of an abandonment of the quarry. That conditions may become so dangerous in a quarry that nothing short of abandonment of the enterprise will satisfy the requirements of the law, may be conceded; but we are of opinion that this record discloses no such condition. A seam was discovered in the face of this rock so slight that only the end of a thin knife blade could be inserted in it. After four years no movement of the

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rock was discovered, though constant, careful inspection of the whole environment was made. Sixty feet lower down, and after the lapse of three or four years, another seam was discovered of like character. Measures were taken such as are in use to safeguard the situation thus disclosed, and months afterwards, without warning of any kind the disaster occurs.

We have not enlarged, by way of citing authorities, upon the general duty of a master, but have contented ourselves with a statement of the general principles which are illustrated by almost innumerable cases in our reports, and we shall conclude with a general reference to only a few of them. *Bertha Zinc Co.* v. *Martin, supra; Norfolk, &c., Traction Co.* v. *Ellington,* 108 Va. 245, 61 S. E. 779, 17 L. R. A. (N. S.) 117; *Southern Ry. Co.* v. *Mauzy,* 98 Va. 692, 37 S. E. 285; *Potomac, &c., R. Co.* v. *Chichester,* 111 Va. 152, 68 S. E. 404; *Southern Ry. Co.* v. *Foster,* 111 Va. 763, 69 S. E. 972; *Southern Ry. Co.* v. *Lewis,* 110 Va. 851, 67 S. E. 357; *Persinger* v. *Alleghany Ore & Iron Co.,* 102 Va. 354, 46 S. E. 325; *Clinchfield Coal Co.* v. *Wheeler,* 108 Va. 448, 62 S. E. 269.

Upon the whole case we are of opinion that the judgment should be affirmed.

Affirmed.

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Syllabus.

Richmond

THE BUCHANAN COMPANY v. HEIRS OF SMITH AND BANKS AND OTHERS.

January 15, 1914.

Absent, Buchanan, J.

1. EQUITY—*Bill to Quiet Title—Necessary Parties—Adverse Claimants—Squatters.*—Claimants of land whose possession originated many years ago (some of them over three quarters of a century), some of whom assert legal titles, and others equitable titles, to portions of the land by processes recognized by law, and who are legally and beneficially interested both in the subject-matter and the event and object of a suit to remove their claims as clouds upon complainants' title, are not mere squatters, but *bona fide* adverse settlers and are *necessary* parties to such suit.
2. EQUITY—*Necessary Parties—Parties by Representation.*—Necessary parties include all persons, natural or artificial, however numerous, materially interested, either legally or beneficially, in the subject-matter or event of the suit, and who must be made parties to it, and without whose presence in court no proper decree can be rendered. This rule is inflexible except where it is practically impossible to comply with it, and the absent parties are represented by others who have the same interest and are equally certain to bring forward the entire merits of the controversy as would the absent persons.
3. EQUITY—*Quieting Title—Who May Sue—Code, Section 3058 as Amended.*—Since the amendment of section 3058 of the Code in 1912 (allowing any person who has an equitable title to land and the right to the legal title to file a bill to remove a cloud upon the title to real estate, whether he be in possession or not), a person who has neither the complete legal and equitable title to land nor the actual possession thereof, may implead the unknown heirs and claimants under former owners, who are also out of possession and who have long ago abandoned the land, to quiet its title and remove a cloud therefrom.
4. DISMISSAL—*Without Prejudice.*—The dismissal of a bill for want of necessary parties should be without prejudice.

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Appeal from a decree of the Circuit Court of Washington county. Decree for the defendants. Complainant appeals.

Affirmed.

The opinion states the case.

Jeffries, Wolcott, Wolcott & Lankford; Brown, Jackson & Knight, and *S. B. Avis,* for the appellant.

Greever & Gillespie and *M. O. Litz,* for the appellees.

WHITTLE, J., delivered the opinion of the court.

This is a suit in equity by the appellant, the Buchanan Company, a non-resident corporation, against the appellees, the unknown heirs of the claimants under Richard Smyth and Henry Banks. The main object of the bill is to remove an alleged cloud on appellant's title to 146,109½ acres of land situated in Buchanan county.

On November 16, 1795, a tract of 200,000 acres of land, including the boundary in controversy, was patented to Richard Smyth and Henry Banks, and the bill charges that the excess of the original tract over the land in dispute was found to lie in the State of Kentucky. Appellant attempts to connect its title with the original grant by the allegation that ninety odd years before the institution of this suit the land was sold for delinquent taxes due from Smyth and Banks to the United States, and was purchased by William Lamb to whom a tax deed was executed by William D. Taylor, collector, on November 3, 1823. It is sufficient to say that appellant claims mediately under this tax deed, without referring specifically to intermediate conveyances embraced in its chain of title. The alleged cloud upon the title sought to be removed is the original grant from the Commonwealth of Virginia to Smyth and Banks.

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The bill, after asking that the unknown heirs and claimants under Smyth and Banks be made parties, concludes with the prayer, "that as against the said defendants it may be judicially determined, ascertained and decreed that all proceedings necessary to a proper and valid sale of said land for the direct taxes under which the same was sold and purchased by William Lamb, and pursuant to which said land was conveyed to him as aforesaid, were regular, complete and fully complied with; that each and all of the recitals made in the said deed . . are true; that its title to the land conveyed to it on February 17, 1905, by W. L. Dennis, county clerk of Buchanan county, may be quieted as against the defendants hereto, and that it may, as against the defendants hereto, be decreed to be the sole, legal and beneficial owner of the whole of said land in fee simple, and that by further decree each of the said defendants may be perpetually enjoined from asserting or prosecuting judicially or otherwise any claim to said premises against your complainant; that this court will order the decree so entered by it in this suit to be certified and transmitted to the county clerk of Buchanan county for recordation in the book in his office in which deeds are recorded, to the end that a complete and absolute title in fee simple to said land as against the said parties defendant may be shown by the records of said clerk's office . ."

Bruce C. Banks and Fanny Banks Muncey, two of the heirs at law of Henry B. Banks, appeared and demurred to the bill setting forth the grounds of demurrer in writing. Thereupon, the circuit court sustained the demurrer but granted leave to the plaintiff to amend its bill if it should so desire, and certain bar amendments were made which do not demand special notice.

The defendants again demurred to the bill as amended assigning the same grounds relied on in the demurrer to the original bill, which last named demurrer the court

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likewise sustained; and complainant not desiring to make any further amendment the bill was dismissed with costs. From that decree this appeal was granted.

We shall confine our consideration of the ruling of the trial court to a single ground of demurrer, namely, that the bill and exhibits showed that all necessary parties were not made defendants.

It appears from exhibits with the bill, and just inferences from facts therein disclosed which necessarily flow therefrom, that since the execution of the deed from Taylor, collector, to Lamb, numerous parcels of land included within the original boundary have passed into the possession of adverse claimants under junior grants from the Commonwealth, court rights, and possession under color of title and claim of right predicated upon forfeiture of the entire tract to the Commonwealth for non-payment of taxes by former owners. The possession of some of these tracts originated as early as the year 1837. These claimants are, therefore, not mere squatters as was assumed in the argument of the case, but *bona fide* adverse settlers, who in some instances assert legal title and, in other, equitable titles to portions of the land by processes recognized by law, and are legally and beneficially interested both in the subject matter and the event and object of the suit. In these circumstances, it is the settled rule of practice that such persons are necessary parties and must be made defendants.

Professor Hogg, in his work on Equity Procedure, section 36, defines *necessary parties* as follows:

"Necessary parties include all persons, natural or artificial, however numerous, materially interested either legally or beneficially in the subject matter or event of the suit and who must be made parties to it, and without whose presence in court no proper decree can be rendered in the cause. This rule is inflexible, yielding only when the alle-

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gations of the bill disclose a state of case so extraordinary and exceptional in character that it is practically impossible to make all parties in interest parties to the bill, and, further, that others are made parties who have the same interest as have those not brought in, and are equally certain to bring forward the entire merits of the controversy as would the absent persons. This cardinal principle governing as to parties to suits in equity is founded upon the broad and liberal doctrine that courts of equity delight to do complete justice by determining the rights of all persons interested in the subject matter of litigation, so that the performance of the decree rendered in the cause may be perfectly safe to all who are required to obey it, and that further litigation touching the matter in dispute may be prevented. On the other hand, persons wholly without any interest in the subject matter of the suit are neither necessary nor proper parties thereto . . .

"It follows from this classification, that necessary parties must be made parties to the suit; . . ."

And in section 37 he says: "There is no precise or universal test by which to determine when the interest of a person is such as to make him a necessary or proper party to a suit; further than that it must be a future and very uncertain and contingent interest. As to the nature of the interest it is not material whether it be legal or equitable, or present, direct and immediate, so it be some fixed interest, that may be affected or bound by the decree to be rendered in the cause. . . .

"It is not all persons who have an interest in the subject matter of the suit, but, in general, those only who have an interest in the object of the suit, who are ordinarily required to be made parties to it."

The principles enunciated in the text are of general application and fully sustained by the authorities. 1 Barton's Chy. Pr. 141; 1 Story's Eq. Pl. (9th ed), secs. 72, 76,

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137, 142, 147; *Clark* v. *Long*, 4 Rand. (25 Va.) 451; *Lynchburg Iron Co.* v. *Tayloe*, 79 Va. 671.

Prior to an act approved February 20, 1912, amending and re-enacting section 3058 of the Code (Acts 1912, p. 76), which went into effect about one month before the institution of this suit, a court of equity would have had no jurisdiction of the case; because, before that amendment, it was settled law in this State that only those who had a complete legal and equitable title to land accompanied by possession could invoke the jurisdiction of a court of equity to remove a cloud on their title. A person out of possession could not maintain such a suit, because if he had the legal title his remedy at law would be plain, adequate and complete, and if he had the complete equitable title a court of equity would aid him to acquire the legal title, and he could then bring his action of ejectment to recover the land. *Otey* v. *Stuart*, 91 Va. 714, 22 S. E. 513; *Kane* v. *Va. Coal & Iron Co.*, 97 Va. 329, 33 S. E. 627; *Smith* v. *Thomas*, 99 Va. 86, 37 S. E. 784; *Steinman* v. *Vicars*, 99 Va. 595, 39 S. E. 227; *Glenn* v. *West*, 103 Va. 521, 49 S. E. 671. But the statute now declares that any person who has an equitable title to land and the right to the legal title may file such a bill whether he be in possession or not. So that the case presents the anomaly under the former rule of a person who has neither the complete legal and equitable title nor actual possession impleading unknown heirs and claimants under former owners, who are also out of possession, and who, as the bill alleges, have long ago abandoned the land, to quiet its title and remove a cloud therefrom. Yet the plaintiff fails to make *bona fide* claimants in adverse possession of portions of the land defendants—persons whose rights are vitally affected, and who are directly interested in resisting the effort of the plaintiff to connect itself with the Commonwealth by the establishment of an unbroken, perfect record title superior in point of time to

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that of all other claimants, and which was imperfect at the time their rights accrued. *Jesse* v. *Preston,* 5 Gratt. (46 Va.) 120.

It is not easy to determine the precise scope of appellant's bill; but if, in addition to the prayer to remove a cloud on title, it is fairly to be construed as also a bill under Virginia Code, sec. 2361, to supply records or papers forming links in its title, then by the terms of that section the adverse claimants referred to are made necessary parties.

So, in either aspect of the case, the decree appealed from sustaining the demurrer to the amended bill was right and proper.

The decree is silent as to the reasons that controlled the learned circuit court in reaching its conclusion. We were told in argument that the basis of the decree was that all necessary parties were not made defendants. That was the sole ground of demurrer considered by this court, and it is the general rule in such circumstances that the dismissal of the bill should not be on the merits but should be without prejudice. *Scott* v. *Baskerville,* 6 Munf. (20 Va.) 20; *Allen* v. *Smith,* 1 Leigh (28 Va.) 254; *Lockbridge* v. *Sharrot,* 5 Leigh (32 Va.) 410; *Beatty* v. *Barley,* 97 Va. 11, 32 S. E. 794; *Wasserman* v. *Metzger,* 102 Va. 837, 47 S. E. 820.

Upon these considerations we are of opinion that the decree of the circuit court should be affirmed, subject only to the amendment that the dismissal of the amended bill must be without prejudice.

Affirmed.

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Richmond

CANNON v. BATES.

January 15, 1914.

1. BROKERS—*Commissions—Change of Price by Owner.*—If only one real estate broker is employed, and he contracts to furnish a purchaser of the land at a stipulated price, and he furnishes one whom the owner accepts, but in the negotiation the owner agrees upon and accepts a different price from that at which the agent was instructed to sell, such agent is entitled to his commission.

2. BROKERS—*Commissions—Several Brokers—Ignorance of Each Other's Employment.*—Where two or more brokers are authorized to make a sale of land, but are ignorant of each other's employment, the broker who was the procuring cause of the sale is entitled to the commission. If such broker is the efficient cause of the sale, the fact that another broker or the owner of the land himself takes the matter in hand and completes the sale, does not affect the right of such broker to the commission. Where two or more of such brokers have been endeavoring to bring about a sale which is formally consummated, each may have rendered meritorious services without which that result would not have been reached. In such a case, a discrimination must be made between them to ascertain whose services must be deemed to be the efficient and effective cause of the sale.

3. BROKERS—*Commissions—Several Brokers—Knowledge of Each Other's Employment.*—If two or more brokers are employed to sell the same land, and they know of each other's employment, and one of them is not more favored than another by the principal, the owner may sell to the purchaser who is first produced, and the broker producing such purchaser is entitled to the commission.

Error to a judgment of the Law and Equity Court of the city of Richmond, in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Reversed.

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The opinion states the case.

Hill Montague and *R. E. Byrd,* for the plaintiff in error.

Garnett, Pollard & Smith, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is an action of assumpsit brought by John W. Bates, the plaintiff, a real estate agent, to recover commissions from Dr. James Cannon for services rendered in the sale of a lot lying in the city of Richmond. There was a verdict and judgment in favor of the plaintiff and to that judgment this writ of error was awarded.

It appears from the evidence, in which there is little conflict, that on October 18, 1910, the plaintiff wrote to the defendant that he had a party who was anxious to buy a lot on the thoroughfare upon which the defendant's property was situated, and requested the defendant to advise him what was the lowest price he would take for the lot, and asked an early reply. On the next day the defendant, who after receiving the letter had come to Richmond, 'phoned the plaintiff's place of business that he would sell the lot at the price of $160 per front foot, but that he would not give him an exclusive agency to sell the property at that or any other price as the property was already in the hands of Elam & Funsten (real estate agents) for sale. On the 20th of that month the plaintiff offered the lot to Henry W. Wood at the price named ($160 per front foot). Wood made an offer in writing of $150 per front foot. This offer was taken to the defendant by the plaintiff, who urged or advised its acceptance. The defendant declined to accept the offer. It was then agreed between the plaintiff and defendant that the defendant would see Mr. Elam of the firm of Elam & Funsten (through whom the prop-

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erty had been purchased by the defendant) and advise with him as to the value of the property, but was requested not to tell Mr. Elam who the proposed purchaser was. The defendant did see Mr. Elam on the next day, the 21st of October, and was advised that the property was worth, if divided into two lots, $175 per front foot for the corner lot or $170 per front foot for the whole. The defendant 'phoned from Elam & Funsten's office to the plaintiff that Mr. Elam advised him not to sell the land for less than $175 for the corner or $170 for the whole lot per front foot. The plaintiff thereupon went to see the defendant who authorized him to sell the corner lot at $175 or the whole at $170 per front foot. The plaintiff notified Mr. Wood that his offer of $150 had been declined and informed him of the advanced price the defendant had placed upon the lot, and that other agents had valued the property at more money, mentioning Mr. Elam as one of them. Mr. Wood declined to increase his offer, but said he would see him later. On the next day, Saturday (the 22nd) the plaintiff left the city and did not return until the morning of the 26th. On his return he was informed that Mr. Wood had increased his offer to $160 per front foot. On the same day the plaintiff met the defendant on the street and told him that Mr. Wood had increased his offer to $160. The defendant said that he did not have time then to talk to him, but told him that price would not buy the property, or that he did not think he could accept that offer. The defendant had no communication with Mr. Wood, who had without his knowledge taken up the matter of the purchase of the property with Elam and told him that if he had known that his firm were agents for the sale of the lot he would have gone to them before going to the plaintiff; that Mr. Wood offered him (Elam) $160 per front foot for the corner lot, but he was told by Elam that it was useless to submit that offer to the defendant. Elam then advised Wood

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that he had better take the whole lot, giving his reasons why it would be better to do so, and Wood requested Elam to get from the defendant the lowest price that he would take for the whole lot, saying that he (Wood) might be willing to give $165 per front foot for it. Elam at once saw the defendant, who named as his lowest price $167.50 per front foot if the whole lot was taken at once. Elam returned to Mr. Wood who agreed to give that price, and the deal was closed on the 26th of October, and the conveyance made in due course, the firm of Elam & Funsten deducting the usual commissions for selling in their settlement with defendant.

Mr. Elam testified that after effecting the sale he met the plaintiff, who said to him that he understood his firm had sold the property and asked the price obtained. When told, he expressed surprise, as he had learned that Mr. Wood had advanced his offer to $160 and he supposed he had purchased at that price. The plaintiff then wrote the following letter to Dr. Cannon:

"Dear Sir:

"I see that a deed from you to Mr. H. W. Wood has passed, conveying the property at the northeast corner of Monument Ave. and Mulberry St., at the price of $15,703.13.

"I introduced Mr. Wood to this property and, as you are aware, negotiated with him for its purchase and I expect you to recognize my agency for this sale. My commissions are the usual ones charged, namely: 3 *per cent.* on the first $5,000.00, 2½ *per cent.* on the next $10,000.00 and 2 *per cent.* on the balance, making a total of $414.06 which I will thank you to remit at your earliest convenience.

"Yours very respectfully,"

To this letter Dr. Cannon replied as follows:

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"Dear Sir:

"Your note received and in reply will say that I am much surprised at your letter. You did introduce Mr. Wood to this property, but you did not get an offer for the property that I would accept. When you made your offer of one hundred and sixty dollars ($160.00) I rejected it. Mr. Wood then took up the matter on his own motion with Elam & Funsten, stating to them that he thought perhaps they had some property to sell on Monument Avenue, and they told him they had and mentioned my property at once, and talked with me, and I told them that I would sell it for one hundred and seventy-five dollars ($175) for the corner, one hundred and seventy dollars for the entire frontage. They saw Mr. Wood and he was not willing to give that much, and I finally agreed to take one hundred and sixty-seven dollars and fifty cents ($167.50), and they sold the property at that price.

"I did not recognize anybody in the transaction except the parties who sold the property and Mr. Wood. I had a right to refuse to sell my property at the price you offered, and exercised that right, and I had a right to accept the price offered me by Elam & Funsten, and I exercised that right. If you desire to discuss the matter with those gentlemen, that is with you and not with me, but it is rather amazing to me that you should think for one moment that I am under obligation to you when you could not get the price for the property I demanded.

"Regretting that you should have any such feeling about it, I am

"Sincerely yours,"

The errors assigned are to the action of the court in giving and refusing instructions, and in refusing to set aside the verdict of the jury as contrary to the law and the evidence.

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The plaintiff offered five instructions and the defendant three. Of these the court gave No. 1 as asked for by the defendant, amended and gave No. 1 offered by the plaintiff, and rejected all the others.

The plaintiff's instruction as amended was as follows: "The court instructs the jury that if they believe from the evidence that the defendant authorized the plaintiff to sell his property at the northeast corner of Monument Avenue and Mulberry Street at one hundred and seventy ($170) dollars a front foot, and that the plaintiff, acting on said authority, interested Mr. H. W. Wood in said property as a prospective purchaser and gave his name to the defendant as a prospective purchaser, and that thereafter the defendant, either personally or through agents, negotiated for the sale of said property with said Wood and afterwards, while authority to plaintiff was unrevoked, sold said property to said Wood for one hundred and sixty-seven and one-half dollars ($167.50) a front foot, and that the services of the plaintiff in interesting said Wood in said property procured the subsequent sale which was made, then the plaintiff was the procuring cause of said sale, and they should find for the plaintiff and award him such compensation for his services as they believe reasonable, fair and just under all the facts and circumstances of the case.

"If the jury do not believe from the evidence that the services of the plaintiff brought about or procured the sale which was made, then they should find for the defendant."

The defendant's instruction No. 3, rejected by the court, told the jury that, "if they believe from the evidence that the defendant had placed his property in the hands of several real estate agents to sell, and that the plaintiff and Elam & Funsten were among that number, then the agent who procured a purchaser ready and willing to complete the purchase upon terms satisfactory and agreed to by the defendant is entitled to commissions on the sale, to

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the exclusion of all other agents; and if the jury believe from the evidence that Elam & Funsten first secured from Henry W. Wood an offer to purchase the lot in question at the price of $167.50 per front foot, which was accepted by defendant and the sale made to Wood at that price, then they are instructed that the plaintiff is not entitled to recover in this cause, and they must find for the defendant."

These two instructions substantially present the contentions of the plaintiff and defendant as to the proper rule or principle of law by which the right of the plaintiff to the commissions sued for was to be determined. Whether or not the court erred in giving the one and refusing the other depends upon the question whether or not the same rule of law is applicable to a case like this, where two or more real estate brokers are authorized to make sale, each knowing of the other's employment, and a case in which there is only one broker, or if more than one they do not know of the employment of each other.

If only one real estate broker is employed, it is settled in this State, and generally it is believed, that where such broker contracts to furnish a purchaser of the land at a stipulated price, whom the owner accepts, and in the negotiation the owner agrees upon and accepts a different price from that at which the agent was instructed to sell, such agent is entitled to the commissions. *Paschall & Gresham v. Gilliss,* 113 Va. 643, 75 S. E. 220; 2 Clark & Skyles on Law of Agency, p. 1682.

It also seems to be the general rule that where two or more brokers are authorized to make sale of land, but are ignorant of each other's employment, that the broker who was the procuring cause of the sale is entitled to the commissions. Where such broker is the efficient cause of the sale, the fact that another broker, or the owner of the land himself, takes the matter in hand and completes the sale does not affect the right of such broker to the commissions.

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2 Clark & Skyles on Law of Agency, p. 1682, and cases cited in note. Where two or more of such brokers have been endeavoring to bring about a sale which is formally consummated and each may have rendered meritorious services without which that result would not have been reached, a discrimination must be made between them to ascertain whose services must be deemed to be the efficient and effective cause of the sale. *Whitcomb* v. *Bacon,* 170 Mass. 317, 49 N. E. 742, 64 Am. St. Rep. 317; 2 Clark & Skyles &c. p. 1683 and cases cited in notes.

While the cases are not in accord, the better rule seems to be that where two or more brokers are employed and they know of each other's employment, and one of them is not more favored than another by the principal, he may sell to the purchaser who is first produced, and the broker producing such purchaser is entitled to the commissions. 2 Clark & Skyles on Agency, p. 1683; 19 Cyc. 260; and *Chaffie* v. *Woodren,* 48 Col. 34, 108 Pac. 995, 139 Am. St. 220, and cases cited in notes to each.

In the case of *Vreeland* v. *Vreeland,* 33 N. J. 247 (a leading case) the reasons for this rule are stated very clearly by Chief Justice Beasley. Where the brokers know of each other's employment he says, "each is aware that he is subject to the arts and chances of competition. If he finds a person who is likely to buy and quits him without having effected a sale, he is aware that he runs the risk of such person falling under the influence of his competitor—and in such case he may lose his labor. This is a part of the inevitable risk of the business he has undertaken. On the other hand, if fortune should be propitious, a bidder for the property on sale, who has been selected by his rival, may come to him and by his means effect the bargain. Now in the competition the vendor of the property is to remain neutral; he is interested only in the result. But when either of the agents thus employed brings a purchaser to

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him and a bargain is struck at the required price, on what ground can he refuse to complete the bargain? Can he say to the successful competitor, this purchaser was first approached by your rival, and you should have refused to treat with him on the subject? There is no legal principle upon which such a position can rest. It is contrary to the usages of every day commerce. Every advertisement of a stock of goods for sale has a tendency to carry off the customers of rival dealers; and if, therefore, it should be known to the vendor of the property that the agent who introduces a purchaser to him has by the usual arts of competition, taken such purchaser out of the hands of his rival, I am not aware of anything in the law which would justify such vendor in refusing to complete the contract. The task would be difficult and the risk great if vendors were called upon to decide between the claims of contestants. How would it be possible for such vendor to say whose influence it was that produced the sale, where the purchases has been solicited by both agents? It would be at variance with all practical rules to require the party selling to pronounce, under the penalty of paying double commissions, upon the metaphysical question, which agent under the circumstances was the efficient cause of the sale. In the absence of all collusion on the part of the vendor, the agent through whose instrumentality the sale is carried to completion is entitled to the commissions."

In *Francis* v. *Eddy,* 49 Minn. 447, 449, 52 N. W. 42, 44, Judge Mitchell, in speaking for the court, said, in a case very much like the case under consideration: "The plaintiff knew that the property was also listed with another broker and hence that he was subject to the chances of competition, and that if he entered into negotiations with a prospective customer and before any sale was effected the party went to the competitor, or fell under his influence, he was liable to lose his labor. This was one of the inevitabe risks

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of the business. All there is of this case is that the plaintiff attempted to procure Collum as a purchaser for the property for $10,000, and did not succeed, or at least had not when Collum went to the other broker, who succeeded in selling to him at $9,500. We fail to see how in this state of facts it can be claimed that the plaintiff procured a purchaser for the property. Owners have the right to place their property with more than one broker; but if the plaintiff can recover upon the facts of this case, such owners, however honestly and impartially they may have acted, would be placed in a most embarrassing position and subjected to the liability of paying double commissions in every case where it could be shown that the purchaser produced by one broker had ever spoken to the other broker about the property."

In *Edwards* v. *Pike,* 49 Tex. Ct. App. 30, 107 S. W. 586, the owner of land employed two brokers to sell the same, each having knowledge of the other's employment. One of them secured a prospective purchaser, upon terms agreed to by the owner, but before any agreement with such purchaser was reduced to writing so as to bind the purchaser, the other broker consummated the sale to that person under terms which though more favorable to the purchaser, were satisfactory to the owner. *Held,* that the owner was liable for commissions only to the broker who actually consummated the sale. The court said in that case, that "In the absence of special circumstances which would make it proper to so charge him, the owner ought not to be held liable for commissions to more than one broker, and after actually selling his property to a purchaser produced by one broker on terms negotiated by such broker and not by another, he ought not, before paying him the commissions as suggested by the charges refused, at his peril, to determine whether some other broker was not in fact the procuring cause of the sale. In such a case the risk of finally

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effecting by his agency, on terms agreed upon between him and the buyer, a sale of the property, ought to be borne by the broker. His services toward effecting one are performed with a knowledge on his part that another broker has authority similar to that conferred upon him; and if before a sale is completed the buyer quits him and on other terms consummates it through another agent, it is a contingency he should be held to have contemplated at the time he undertook the service, and about the happening of which he has no right to complain."

Again, the court said: "The broker who undertakes a sale of property with full knowledge that another broker has also undertaken to sell, ought to expect no more of the owner than that he will not interfere in favor of the one or the other."

In *Higgins* v. *Miller,* 109 Ky. 209, 58 S. W. 580, it was held that when property has been listed for sale with different real estate agents, the agent who induces the seller and the purchaser to enter into the contract is entitled to the commissions, though another agent may have first brought the parties together, and when the property is with the plaintiff's knowledge in the hands of several agents, the rule of non-interference applies only to the owner, and the agent who first actually sells the property is entitled to the commission.

In *Glascock* v. *Vanfelt,* 100 Tenn. 603, 46 S. W. 449, it was said that "when a principal employs more than one broker, and the several brokers act independently and with knowledge of this fact, the one who first completes a sale is entitled to the commissions."

In *Ward* v. *Fletcher,* 124 Mass. 224, it was said by C. J. Gray (afterwards Mr. Justice Gray) in a case where the plaintiff did not have the exclusive right to sell: "One broker who is unsuccessful in effecting a sale does not become entitled to commissions upon the success of another."

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In *Scott* v. *Lloyd,* 19 Colo. 401, 35 Pac. Rep. 733, it was said that "it is beyond question that the plaintiffs produced the purchaser to whom they (the land owners) sold and conveyed the property, and they were not bound to inquire what part, if any, other agents had in the transaction. They could remain neutral as between competing agents and, by paying the commissions to the one who brought the purchaser to them, be relieved of liability to any other."

In *Nation* v. *Harness,* 33 Okla. 630, 126 Pac. 799, it was held that when property has been listed for sale with different real estate agents the agent who induces the seller and purchaser to enter into the contract is entitled to the commissions, although another agent may have first brought the parties together.

It follows from what has been said that we are of opinion that the instruction "b" given by the court did not state the law applicable to the facts of this case, and that the defendant's instruction No. 3 did, and that the trial court erred in giving the one and in refusing to give the other.

Without discussing the other errors assigned, the court is of opinion that the judgment complained of must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

Reversed.

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Syllabus.

Richmond

CHESAPEAKE AND OHIO RAILWAY COMPANY v. SWARTZ.

November 20, 1913.

ON PETITION TO REHEAR JANUARY 15, 1914.

1. PLEADING—*Declaration—Assumption of Risk—Contributory Negligence.*—Assumption of risk and contributory negligence are matters of defense, and the fact that the plaintiff has not assumed the one or been guilty of the other need not be averred in the declaration. If, however, the declaration shows that the plaintiff has assumed the risk or been guilty of contributory negligence, it will be held bad on demurrer.
2. MASTER AND SERVANT—*Fellow-Servants—Railroads.*—By the express terms of section 162 of the Constitution of Virginia a railroad employee is declared not to be the fellow-servant of a co-employee in charge of a locomotive engine.
3. PLEADING—*Declaration—Bill of Particulars.*—Where a declaration states a good cause of action and the defendant desires a more particular statement of the grounds of complaint, he should demand a bill of particulars under section 3249 of the Code.
4. PLEADING—*Declaration—Allegation of Negligence—Disobedience of Rules.*—A count of a declaration which sets out in detail how the defendant had modified or partially abrogated one of its rules, and then substantially alleges that the injury complained of was occasioned by the negligent failure of the defendant to observe the rule as modified, states a good cause of action.
5. PLEADING—*Variance — Amendments — Continuance—Code, Section 3384.*—Where there is a variance between the allegations of the pleadings and the evidence, it is in conformity with section 3384 of the Code to allow the pleadings to be amended and, if need be, continue the case, and the practice is to be commended as promotive of substantial justice.
6. EVIDENCE—*Published Rules of Railroad—Partial Abrogation—Parol Evidence.*—It is entirely competent to show by parol that a printed rule of a railroad company had been modified or partially abrogated in its application to a particular yard of the company by those charged with its application and enforcement on that yard, and that its application in the modified form was the universal practice on that yard. This does not vary or contradict the terms of the rule nor submit its interpretation to the jury.

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Syllabus.

7. EVIDENCE—*Railroads—Personal Injury—Report to Company—Production.*—In an action against a railroad company to recover for a personal injury, the court may require the production by the defendant of a contemporaneous written statement of an employee concerning the injury complained of who was examined as a witness by the defendant. The statement is admissible for the purpose of impeachment if it contradicts the witness, and if it does not contradict, but corroborates him, then it is not prejudicial to the defendant.

8. RAILROADS—*Personal Injury—Negligence—Acts of Agent.*—The acts of the engineer and fireman of an engine, done in the presence and by the direction or at the request of a hostler who has taken charge of the engine on a railroad yard, and who knows that the train is protected by blue lights, are as much the acts of the hostler as if done by him personally.

9. APPEAL AND ERROR—*Verdicts—Conflict of Evidence—Plaintiff in Error.*—Where the evidence is conflicting the verdict of the jury settles the conflict, and the plaintiff in error occupies the position of a demurrant to the evidence.

10. APPEAL AND ERROR—*Personal Injury—Verdicts—Excessive Damages.*—Where a personal injury case has been fairly submitted to the jury on the law, and there is ample evidence to sustain the findings of the jury, their verdict, approved by the trial court, awarding the plaintiff $17,000 damages for a broken leg and other injuries and suffering, will not be set aside on appeal.

ON PETITION FOR REHEARING.

11. MASTER AND SERVANT—*Railroads—Rules—Construction—Modification.*—The allegation that a rule of a railroad company had been modified and partially abrogated by the company in certain designated particulars is not altered by the fact that the pleader has elsewhere spoken of the change as the construction of the rule habitually practiced and acquiesced in with the knowledge of the company.

12. MASTER AND SERVANT—*Negligence of Fellow-Servant—Virginia Constitution and Statute.*—A declaration in an action against a railroad company which charges that the relation of master and servant existed between the defendant and the plaintiff; that the plaintiff at the time of the injury was engaged in work on a car, and that the injury sustained was occasioned by the negligence of the hostler, a fellow-servant in charge of a locomotive engine, states a case for recovery by the plaintiff under section 162 of the Constitution and section 1294-k of the Code.

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13. MASTER AND SERVANT—*Safe Place—Injury to Car Repairer—Non-Assignable Duty—Negligence of Engineer—Proximate Cause.*—Independently of statute, the master owes to the servant the non-assignable duty of using ordinary care to furnish him a reasonably safe place in which to perform his work, and if the hostler in charge of a train directs an inexperienced fireman to back the engine in order to give slack for uncoupling, and he does it negligently, thereby injuring a repairer under the train who had given due notice of his presence, the master is liable. The omission of the hostler to discharge his duty was, in legal contemplation, the proximate cause of the injury as between the plaintiff and the defendant, and the negligence of the fireman was but a link in the chain of causation. It is not the negligence of the fireman for which the company is liable, but the dominant negligence of the hostler, who was the defendant's *alter ego*. For discussion of "proximate cause" see opinion of Whittle, J.

14. MASTER AND SERVANT—*Injury to Car Repairer—Avoidable Injury—Instructions.*—In an action by a car repairer for an injury inflicted on him by backing the engine attached to the car he was repairing after a blue light had been put on the car, indicating his presence, it is not error to refuse to instruct the jury "that if, upon the evidence, the plaintiff could have avoided the injury by waiting till the engine was uncoupled, he could not recover" where the undisputed evidence was that the plaintiff went under the car in the proper discharge of his duty as car repairer, and also in obedience to the express command of the car inspector, whose orders he had been specifically directed to obey.

15. INSTRUCTIONS—*Sufficiently Instructed.*—It is not error to refuse an instruction substantially covered by another instruction already given by the court.

Error to a judgment of the Circuit Court of the city of Clifton Forge in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The following instructions were given by the court:

AT THE REQUEST OF THE PLAINTIFF.

No. 1. The court instructs the jury that the law presumes

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that the plaintiff, Swartz, was not guilty of contributory negligence and that he exercised due and proper care for his own safety; and if the defendant company relies on the defense that he would not have been injured but for his contributory negligence, then the burden of proof is on the defendant company to establish such contributory negligence of the plaintiff by a preponderance of the evidence unless such contributory negligence appears from the plaintiff's evidence, or can be fairly inferred from all the circumstances in the case.

No. 2. The court instructs the jury that if they believe from the evidence in this case that the defendant was guilty of negligence, as charged in the first, second, third, fifth and sixth counts of the plaintiff's second amended declaration, or guilty of negligence as charged in any one of said counts, and that such negligence of said defendant company was the sole proximate cause of the plaintiff's injury, then they ought to find a verdict for the plaintiff.

No. 3. The court instructs the jury that if they should find for the plaintiff, they may, in estimating his damages, take into consideration the physical and mental suffering of the plaintiff caused by his injury; his loss of wages for the time during which he was prevented, by said injury, from working; proper compensation for his being unable, because of his injury, to follow such a calling or business as he could otherwise have followed; and if they believe from the evidence that the plaintiff's injury is permanent, they are further instructed that, in estimating his damages, they may also take into consideration his probable duration of life, and to show this they may take into consideration the standard mortality tables as showing the probable duration of the plaintiff's life under all proof in this case.

AT THE INSTANCE OF THE DEFENDANT.

A. The court instructs the jury that the burden of proof

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is upon the plaintiff in this case to prove by a preponderance of the evidence to their satisfaction that the defendant was guilty of negligence, as stated in the declaration, and that this negligence was the sole proximate cause of the injury. He cannot recover if it is just as probable that the injury resulted from some cause for which the defendant was not responsible as for some cause for which it was responsible.

B. The court instructs the jury that it is their duty to try this case without being influenced by sympathy from the mere fact that the plaintiff was injured and has suffered, for the jury as much as the court are under the solemn obligation of an oath to decide according to the law and the facts. Without negligence on its part the defendant cannot be held liable, and even if the jury believes from the evidence that the defendant has been negligent, and if they further believe from the evidence that the plaintiff also was negligent, and that his carelessness contributed to any extent to his injury, he cannot recover against the defendant.

C. The court instructs the jury that the defendant did not insure or guarantee Swartz's safety. Its only duty was to exercise ordinary care for his safety. Ordinary care depends upon the circumstances of the particular case, and is such care as a person of ordinary prudence, under all circumstances, would exercise, and if the defendant used such ordinary care, it is not liable in case of injury.

On the other hand, Swartz's duty was to use ordinary care for his own safety—that is, such care as a man of ordinary prudence, under all circumstances, would exercise. And Swartz cannot recover, regardless of any failure of the defendant to use ordinary care (if the jury believe such failure on the part of the defendant appears from the evidence), if the jury believes from all the evidence that Swartz also failed to use such ordinary care and that his own imprudence contributed to the injury in any degree.

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D. The court instructs the jury that if they believe from the evidence in this case that Swartz crossed over the train and walked east to the car next to the engine, where he met Inspector Deaton; that he knew that the engine had not been taken away from the train and did not inquire or ascertain whether or not the road engine had been uncoupled; that he knew, or should have known, that the blue light had been placed on the front of this car, between the car and the tender of the engine; that by the custom of the yard the road engine might be uncoupled and moved away at any time when the lights were so placed; and that in giving slack in the usual way to uncouple, the front car might be moved or jarred back by the engine, then the jury are instructed that the plaintiff took upon himself the risk of the injury he received and they must find for the defendant.

J. M. Perry, for the plaintiff in error.

W. E. Allen and *Charles and Duncan Curry*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

For convenience the defendant in error and the plaintiff in error will be called, respectively, plaintiff and defendant.

The second amended declaration contained seven counts, and there was a demurrer to the declaration as a whole and to each count. The circuit court sustained the demurrer to the fourth count and directed the jury to disregard the seventh count, and overruled the demurrer to the other five counts.

(1) The first and second grounds of demurrer to each of the remaining counts are that plaintiff assumed the risk of the alleged injury and was guilty of contributory negligence.

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Assumption of risk and contributory negligence are matters of defense, and the fact that a plaintiff has not assumed the one or been guilty of the other need not be averred. It is nevertheless true that where a declaration affirmatively shows that the plaintiff has assumed the risk, or been guilty of contributory negligence, it will be held bad on demurrer, but that is not predicable of this declaration. *Penn Foundry Co.* v. *Probst,* 114 Va. 264, 76 S. E. 323.

The third ground of demurrer is that the third and fifth counts show that the alleged injury was occasioned by the action of fellow-servants of plaintiff.

The gravamen of the averment in each of these counts is that the hostler in charge of the engine, discovering that he could not uncouple the engine from the train, as it was his duty to do, until it was backed sufficiently to give the necessary slack, with knowledge that the attached train was protected by blue lights, and without warning to the plaintiff, who was at work under the car nearest to the tender, negligently passed an order to the fireman to back the engine for the purpose indicated, which was done in such a careless, reckless and unskillful manner as to occasion plaintiff's injury.

By the express terms of section 162 of the Constitution of Virginia a railroad employee is declared not to be the fellow-servant of a coemployee in charge of a locomotive engine.

The fourth ground of demurrer is that neither the declaration, nor any count thereof, shows the neglect by the defendant of any duty lawfully owing by it to the plaintiff, or any actionable negligence on the part of the defendant.

To the contrary, it is alleged that the relation of master and servant existed between the parties, and in varying from the duty owing from the master to the servant and

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the negligent breach of such duty, the defendant was guilty of negligence. *Hortenstein* v. *Va. Carolina R. Co.*, 102 Va. 914, 47 S. E. 996; *Cedar Works* v. *Dalea*, 109 Va. 237, 64 S. E. 41.

The fifth ground of demurrer is that the first and second counts do not set forth the matters discussed in the last preceding assignment with sufficient particularity and clearness to enable the defendant to understand the nature of the charge which it was called on to answer.

It is an established rule of practice in this jurisdiction that where a declaration states a good cause of action, and the defendant desires a more particular statement of the grounds of complaint, he should demand a bill of particulars under section 3249 of the Code. *Interstate R. Co.* v. *Tyree*, 110 Va. 38, 65 S. E. 500; *Washington-Virginia Ry. Co.* v. *Bouknight*, 113 Va. 696, 75 S. E. 1032.

The sixth and last ground of demurrer is that the material allegations of the second count are self-contradictory and repugnant.

This ground is not well taken. The count substantially alleges that the accident was occasioned by the negligent failure of the defendant to observe the terms of rule 26 with respect to the protection of trains by blue light signals in its modified or partially abrogated form, as set out in detail in that count. The binding effect upon the defendant of the partial abrogation of rule 26 will again be adverted to in considering the case on the merits.

(2) The second assignment of error is that the court at a former trial, having excluded evidence on behalf of the plaintiff for variance between the evidence and allegations, allowed the pleadings to be amended and continued the case.

This ruling was in conformity with section 3384 of the Code, and the practice is to be commended as promotive of substantial justice, and was without prejudice to the defendant.

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(3) The next assignment of error presents the conflicting theories of plaintiff and defendant, involving the very right of the case. The contention of the defendant is that rule 26 (designed for the protection of workmen at work under or about a car, engine or train) is controlling, and being clear and unambiguous, its legal import is to be determined by the court, and that parol evidence was inadmissible to contradict or vary its terms.

This assumption is founded upon a misapprehension of the plaintiff's position. He does not seek to submit to the jury the interpretation of rule 26, nor to contradict or vary its terms. His proposition is that it is competent to allege and prove as a matter of fact that the printed rule in its integrity was never in force with respect to trains on the Clifton Forge yards, but that it had been modified or partially abrogated in regard to such trains. This was the object of the second count in the declaration, already noticed, and for that purpose the evidence, the admission of which is the ground of this assignment of error, was offered. In sustaining the theory of the plaintiff the circuit court was well within the decisions of this court. *Southern Ry. Co.* v. *Johnson,* 111 Va. 499, 69 S. E. 323; *N. & W. Ry. Co.* v. *Cofer,* 114 Va. 434, 76 S. E. 909.

The part of rule 26 applicable to the present controversy reads: "A blue flag by day and a blue light by night, placed on or at the end of a car, engine or train, denote that workmen are at work under or about the car, engine or train. The car, engine or train thus protected must not be coupled to or moved until the blue signal is removed by the person who placed it."

This rule was modified in the following particular: As soon as practicable after a train comes in on the yard at night, and while the engine is still attached, blue lights are to be placed on the rear end of the rear car and on the front end of the foremost car next to the tender, and not

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on the front of the engine. As soon as these lights are placed in position it is the duty of the car inspectors and car repairers to commence work on the string of cars, the blue lights denoting their presence, and are intended for their protection, as indicated in rule 26. It was likewise the duty of the yard hostler, promptly on the incoming of a train, to take charge of the engine and uncouple it from the cars and take it to the round-house for inspection and repairs. If the blue light was placed at the head of the engine, instead of the front end of the car next to the tender, it would "tie it up" so that the hostler could not uncouple it until the blue light was removed. The modified rule was intended to expedite the business of the defendant on the yards, and by careful handling the necessary slack could be given and the engine uncoupled without endangering the safety of workmen under the cars, and this was the universal practice on the Clifton Forge yards.

(4) The next assignment of error denies the right of the trial court, on motion of the plaintiff, to require the production of a contemporaneous written statement of an employee concerning the accident who was examined as a witness by the defendant.

We do not think the trial court exceeded its authority in the premises. Such statement was admissible for purposes of impeachment—as much so as would have been the testimony of an impeaching witness that the employee had, on another occasion, made a contradictory statement. On the other hand, if the statement is not contradictory, but tends to corroborate the testimony of the witness, it would not be prejudicial to the defendant. The trend of modern practice is to relax rather than restrict the rule in regard to the admission of evidence in the effort to develop the whole truth of the matter under investigation.

(5) There was evidence to sustain the claim of the plain-

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tiff that the hostler had assumed charge of the engine for the purpose of uncoupling it from the train preparatory to taking it to the round-house at the time he called on the engineer to give him slack, and he knew at that time that the train was protected by blue lights. In these circumstances in legal contemplation, the acts of the engineer and fireman, done in his presence and by his direction or at his request, were as much his own acts as if done by him personally.

(6) The verdict of the jury has set at rest the conflicting testimony of witnesses, and the case must be considered by this court as upon a demurrer to the evidence by the defendant. Considering the case from that viewpoint, the salient facts are these: At the time of the accident the plaintiff was a car repairer in the service of the defendant, doing night work on its upper yards at Clifton Forge. The yards contain numerous tracks running east and west, and the custom was for two inspectors and two car repairers to work each train as it came in. One inspector, with a car repairer, would take the south side of the train and work from east to west, while the other inspector and car repairer would work the north side from west to east. The inspectors examined each car for defects, and the repairers made such light repairs as they were ordered to make by the inspectors. When the plaintiff was employed as car repairer he was directed to report to the general foreman of car inspectors on the yards, by whom he was assigned to duty under Inspectors Deaton and Holland. He was told that they would instruct him as to his duties and the rules for his guidance, and that he must take orders from them and obey them. He was not given a book of rules, and never saw or knew of rule 26 until after the accident. The inspectors instructed him as to his duties and the terms of the rule as modified with respect to the placing of blue lights. During the entire term of his ser-

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vice the above rule was in force and observed in the yards, and he had never known a train protected with blue lights, as prescribed by the rule, to be moved. It was impossible for the hostler to uncouple the engine and tender from the front car without seeing the blue light.

On the night of the accident plaintiff was working under Inspector Deaton, when a freight train came in on the yards and stopped. Deaton told him they would work that train from the south side, beginning at the end of the car next to the tender, and immediately placed a blue light on that end of the car on the south side. In obedience to an order from Deaton, plaintiff went under the rear end of the front car to replace a yoke bolt. It was necessary for him to go underneath the car to replace the nut, and to assume a sitting posture with his back toward the rear axle of the car. While thus engaged the yard hostler came on the scene to take charge of the engine, and, discovering that the engine could not be uncoupled without slack, he went forward to the engine. He found the engineer standing on the step of the engine in the act of stepping off on the ground. The hostler told him to give him a little slack to cut the engine off; whereupon the engineer directed the fireman, who was still on the engine, to give the slack. The fireman reversed the lever and turned on such a head of steam that the impact forced the front car back for a distance varyingly estimated at from six to fifteen feet. There were thirty-odd iron cars in the train loaded with coal. The violence of the collision was such that it threw plaintiff's right leg across the rail, and his jacket was caught under the wheel and so wound up that he was dragged a number of feet and well-nigh choked to death before he could be released. But the chief injury was to his right leg, the bone of which was crushed and the flesh torn off one side. He was in the hospital for seventeen months, and had since undergone six or seven operations

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for the removal of diseased pieces of bone. The accident happened in April, 1910, and at the last trial, in July, 1912, there was a running sore on his leg; and some of the medical experts were of opinion, from the diseased condition of the leg, that amputation might still become necessary. Plaintiff had been compelled to give up work, his general health was impaired, and he continued to suffer great pain. Prior to the injury he was a robust young man, within a few months of attaining his majority, and with an earning capacity of from sixty-five to seventy dollars per month.

Without discussing the instructions, it is sufficient to say that the case was fairly submitted to the jury on the law, and their verdict awarding the plaintiff $17,000 was approved by the trial court. The assessment, it is true, is larger than usual in such cases, but there was ample evidence to sustain the finding, and, upon familiar principles, this court would not be warranted in disturbing the verdict.

We find no reversible error in the record, and the judgment must be affirmed.

UPON PETITION TO REHEAR.

WHITTLE, J., delivered the opinion of the court.

The rehearing in this case is prayed for on four grounds. The first and second assignments involve the affirmance by this court of the action of the circuit court in overruling the demurrer to the second and fifth counts of the second amended declaration:

1. The interpretation of the second count in the petition for a rehearing is that it attempts by construction and habitual practice, known to and acquiesced in by the defendant, to escape the operation of the unambigious language of printed rule No. 26.

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The divergence of opinion between counsel for the defendant and this court results from a diversity of view as to the legal import of the language employed in that count. On the point in issue the court in its opinion observes:

"The count substantially alleges that the accident was occasioned by the negligent failure of the defendant to observe the terms of rule 26 with respect to the protection of trains by blue light signals in its modified or partially abrogated form, as set out in detail in that count. The binding effect upon the defendant of the partial abrogation of rule 26 will again be adverted to in considering the case on the merits."

The count charges substantially that it was the direction and practice of the defendant, whenever an engine and train came into its yard, for its car inspectors and car repairers to forthwith go about inspecting and repairing the cars; that shortly after the arrival of the train the engine was uncoupled and taken to the company's shops for repairs; that when the train in question came in the yard, it then became the duty of the plaintiff to do such repair work on the cars as he was directed to do, and, it being night, a blue light was placed at the rear end of the rear car of the train and a blue light on the front end of the car next to the engine and tender, and, when lights were so placed, the train of cars, under the rule, could not be moved without notice; that throughout plaintiff's term of service he had been informed and instructed by the defendant that this was the true construction or the habitual practice of the company for the protection of trains, and that construction or practice had been observed and acted on during his entire service as car repairer, and the defendant during that time had taken no steps to require any other observance of the rule.

The foregoing allegations are followed by the specific

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averment that on the night of the accident the lights were placed by the defendant on the train in the manner described, and immediately thereafter the plaintiff received orders to go under one of the cars of the train and to replace a nut on a yoke bolt, and that while obeying that direction he received the injuries complained of.

It thus appears that in their essence the allegations of the count in no way involve the construction of rule No. 26, but, in substance, as the court in its opinion held, are the equivalent of a charge that rule No. 26 had been modified or partially abrogated by the defendant in the particulars mentioned. That fact having, in substance, been alleged, it is none the less an averment of a modification or partial abrogation of the rule because the pleader has elsewhere chosen to speak of the change as the construction of the rule habitually practiced and acquiesced in with the knowledge of the defendant. Moreover, the averment will not be overlooked that at the time of the accident a blue light was placed by the defendant on the front end of the foremost car of the train next to the tender and engine, and when so placed the plaintiff, in obedience to the defendant's order, went under the car and was injured.

2. The ground of demurrer to the fifth count of the second amended declaration is because no actionable negligence is set forth, nor the neglect of any duty lawfuly owing by the defendant to the plaintiff.

This point is pressed with so much confidence that it calls for special notice. We are told: "The gravamen of the count is that the hostler came to the engine and took it in charge, and when he went to the tender to uncouple it from the front car, found it could not be uncoupled without more slack; that the hostler, with knowledge of the inexperience of the fireman (who was still in the engine) in operating the engine, and with knowledge *'that the fireman was without authority to operate said engine,'*

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negligently directed him to reverse the engine, which operation the latter performed so unskillfully that the plaintiff was injured."

The gist of the argument is that the fifth count does not allege that the hostler had any power, express or implied, to delegate the performance of his duties, and that without authority from the defendant he procured the assistance of another employee, the fireman, who was incompetent, and whose inefficiency caused the accident. *Taylor* v. *B. & O. R. Co.*, 108 Va. 817, 62 S. E. 798, and *Board of Trade* v. *Cralle*, 109 Va. 246, 63 S. E. 995, 22 L. R. A. (N. S.) 297, 132 Am. St. Rep. 917, and outside authorities, are cited for the proposition that the master is not liable for the negligence of a person employed by his servant in the prosecution of his master's business without authority, express or implied, to procure assistance. We shall notice these cases more in detail presently.

Let us, however, first consider whether or not the essential charges of the fifth count set forth actionable negligence or the neglect of any lawful duty owing by the defendant to the plaintiff.

The count charges that the plaintiff was employed by the defendant as a car repairer, and while so engaged it was the duty of the defendant to exercise reasonable care for his safety; that on the night of the accident it became the duty of the plaintiff to go under the front car of a freight train of the defendant to do repair work before the engine attached to the train had been uncoupled; that the place where he had to work was a place of danger if the car should be moved; that he went under the car to do repairs, exercising due care and caution, "knowing that the yard hostler, who had control of the said engine, knew, or ought to have known, of his dangerous position. . . . The said yard hostler, whose duty it was to uncouple the engine and tender from said train and take charge of it, . . . took

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the same in charge and saw and knew, or ought to have seen and known, that the said plaintiff was at work under said car in a dangerous place, and when he went to uncouple the engine and tender from the front car, he found that it could not be uncoupled without more slack, and the engineer who had been in charge of the said engine had left the engine, and the said hostler, who knew, or ought to have known, by the exercise of ordinary care, of the inexperience of the fireman, who was still on the engine, in operating, running and controlling an engine, and that the fireman was without authority to operate said engine, carelessly and negligently directed the fireman to reverse the engine and back it, and the said fireman unskillfully and negligently put on a full head of steam and reversed the engine with such force that it ran the whole train of cars . . . back some distance," inflicting the injury of which the plaintiff complains.

The count is founded on the constitutional fellow-servant provision (section 162) and the enabling act passed in pursuance thereof. Va. Code, sec. 1294-k.

The Constitution declares that every employee of a railroad, engaged in work in or upon a car standing upon a track, "shall have the same right to recover for every injury suffered by him from the acts or omissions of any other employee or employees of the common master that a servant would have (at the time when this Constitution goes into effect) if such acts or omissions were those of the master himself in the performance of a non-assignable duty; provided, that the injury so suffered by such railroad employee result from the negligence . . . of a coemployee engaged in another department of labor . . . or who is in charge of any . . . locomotive engine." *Va. & S. W. Ry. Co.* v. *Clowers' Admx.*, 102 Va. 867, 47 S. E. 1003.

The charges in the fifth count are explicit that the rela-

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tion of master and servant existed between the defendant and the plaintiff; that the plaintiff at the time of the accident was engaged in work on a car, and that the injury sustained was occasioned by the negligence of the hostler, a fellow-servant in charge of a locomotive engine. The case, therefore, comes within the terms of the Constitution, which declares that in such circumstances the injured employee shall have the same right to recover for the acts or omissions of the hostler that he would have had at the time the Constitution went into effect if such acts or omissions had been those of the railroad itself in the performance of a non-assignable duty.

Independently, however, of the constitutional provision, the count states a good cause of action. The defendant owed the plaintiff the non-assignable duty of exercising ordinary care to furnish him a reasonably safe place in which to perform the work imposed upon him. And it devolved upon the yard hostler the duty of uncoupling the engine and tender from the car under which the plaintiff was doing repair work. The hostler negligently failed to discharge that duty, and as the result of such failure the plaintiff sustained personal injuries.

The plaintiff had no power to prescribe the agency through which the defendant should fulfill the duty of protection it owed him, nor was he in any way responsible for the acts or omissions of such agency. The act or omission of the hostler for which the defendant is responsible was his neglect to use ordinary care to properly uncouple the engine and tender from the train, and the means adopted by him which resulted in such failure did not concern the plaintiff. In legal contemplation, the omission of the hostler to discharge his duty was the proximate cause of the injury as between the plaintiff and the defendant, and the negligence of the fireman was but a link in the chain of causation. The court does not seek to hold the

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defendant responsible for the negligence of the fireman, but for the dominant negligence of its *alter ego,* the yard hostler.

Bouvier in his Law Dictionary defines *proximate cause* as "that which in a natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred.

"The proximate cause is that which is most proximate in the order of responsible causation. *Butcher* v. *West Virginia & P. R. Co.,* 37 W. Va. 180, 16 S. E. 457, 18 L. R. A. 519; *Lutz* v. *Atlantic & Pac. R. Co.,* 6 N. M. 496, 30 Pac. 916, 16 L. R. A. 819. That which stands next in causation to the effect, not necessarily in time or space, but in casual relation. *Pullman Palace Car Co.* v. *Louck,* 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *Ins. Co.* v. *Boon,* 95 U. S. 130, 24 L. Ed. 395."

"Causa causantis causa est causati"—"the cause of the thing causing is the cause of the thing caused."

In *Aetna Ins. Co.* v. *Boon,* 95 U. S. 117, 24 L. Ed. 395, Mr. Justice Strong, delivering the opinion of the court, says: "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

Again, the learned justice says: "The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss."

There is nothing in the two decisions of this court, cited in the petition for a rehearing, in conflict with the foregoing views.

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In *Taylor* v. *B. & O. R. Co.,* 108 Va. 817, 62 S. E. 798, the court held that "a mere request by a conductor of a freight train of an acquaintance to perform a casual service for his accommodation, which is responded to in the same sipirt of good-fellowship, without either promise or expectation of reward, does not constitute the person requested a servant of the railroad company, and it is not responsible for an injury inflicted on him in consequence of a defect in an appliance used by him while assisting the conductor. A volunteer cannot charge a railroad company with the duty of an employer."

And in *Board of Trade Co.* v. *Cralle,* 109 Va. 246, 63 S. E. 995, 22 L. R. A. 297, 132 Am. St. Rep. 917, the court held that "the owner of a passenger elevator is not responsible for an injury inflicted on a passenger by the negligence of an operator not employed directly or indirectly by the owner, but who was merely requested to operate the elevator for that trip by an 'office boy' of the owner, who had no power or authority, express or implied, to employ a servant for the owner. A master is liable for an injury inflicted on a third person by the acts or omissions of his servants while acting within the scope of their employment and in furtherance of it, but he is not liable as master where he does not occupy the relation of employer to the person whose neglignce occasioned the injury."

3. The third ground for a rehearing was the refusal of the prayer of the defendant for instructions "B" and "C."

Instruction "B" told the jury that if, upon the evidence, the plaintiff could have avoided the accident by waiting until the engine was uncoupled, he could not recover. Under the evidence this instruction was wholly unwarranted. The undisputed evidence was that the plaintiff went under the car in the proper discharge of his duty as car repairer, and also in obedience to the express com-

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mand of the car inspector, whose orders he had been specifically directed to obey.

Instruction "C," that it was as much the plaintiff's duty to take care of his own safety as the defendant's, is substantially covered by another instruction which the court gave.

4. The last assignment goes to the *quantum* of damages awarded by the jury. Upon that proposition we shall content ourselves with the following summary taken from the brief of counsel for the plaintiff, which is fully sustained by the evidence:

"Swartz, when he was injured, was not twenty years of age, and was receiving between $65.00 and $70.00 a month. It was apparent that one so young, receiving wages at this rate, was in the line for promotion and increase of wages. He was injured on the 22nd day of April, 1910, and the verdict was brought in on the 5th day of July, 1912. Shortly before the trial, in June, 1911, he tried to work at light work in a cannery at $1.10 a day, and worked with great pain and suffering during that time, and at the end of three weeks could work no longer and stopped. From the time he was injured until the verdict, he had lost over $1,600 in wages, and had to be cared for and supported. It is reasonably sure that he will never be able to pursue the occupation of a railroad man. According to the tables of mortality in evidence, his expectancy of life was forty-two years, and if his loss, by reason of his injuries being of a permanent character, were estimated at $32 a month, less than half he was earning at the time he was injured, it would amount to $16,128.00.

"All the flesh was torn off his leg between the ankle and the knee, and the bones mashed and crushed up. The bones were wired up and set as well as they could be, and the flesh patched up with numerous pieces of flesh cut out of his thighs. He was then placed 'flat of his back' at the

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hospital and his leg hung up for weeks, and the evidence shows that he suffered agonies from the pain. He was confined in the hospital for seventeen months and had, during that time, six or seven different operations performed on his leg. At the time of the trial his leg was a running sore and a loathsome and horrible sight to behold. The appearance of his leg at the time could not be described. The jury, court, counsel and everyone else took one look and then turned away with a shudder."

Upon these considerations the rehearing is denied.

Affirmed.

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Syllabus.

Richmond

COMMONWEALTH v. LYNCHBURG YOUNG MEN'S CHRISTIAN ASSOCIATION.

January 15, 1914.

1. TAXATION—*Exemptions—Former State Policy Not Changed.*—The constitutional convention, in taking away from the legislature the power of exempting property from taxation, did not intend to change the old policy of the State on the subject of exempting property used wholly for certain charitable purposes, but placed limitations on the use of property exempted, so as to prevent the perversion or abuse of the liberality of the State.
2. TAXATION—*Exemptions—Strict Construction—Y. M. C. A. Buildings—State Policy.*—While the general rule is that provisions exempting property of individuals and private corporations from taxation should be strictly construed, and taxation of such property is the rule and exemption from taxation the exception, yet, as the policy of the State has been to exempt such property as that held by Young Men's Christian Associations, section 183 of the Constitution, relating to such property, should not be construed with the same strictness as that applicable to provisions making exemptions contrary to the policy of the State, and as to such property exemption is the rule and taxation the exception.
3. TAXATION—*Tenants—Lodgers—Occupants of Rooms in Y. M. C. A. Building.*—The occupant of a room or rooms in a tenement is a lodger and not a tenant where the owner retains his character as master of the house and at the same time retains the general control over the whole house. Rooms in a Y. M. C. A. building so occupied are not leased within the meaning of section 183 of the Constitution.
4. TAXATION—*Rooms in Y. M. C. A. Building—Occupation for Hire—Effect on Exemption.*—If the dominant purpose in the use made of rooms in a Y. M. C. A. building is to obtain revenue or profit, although it is to be applied to the general objects of the association, the property is liable to taxation. But if, as in the case at bar, the use made of the rooms has direct reference to the purposes for which the association was incorporated, and

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tends immediately and directly to promote these purposes, then its use is within the provisions of the constitution exempting the property from taxation, although revenue or profit is derived therefrom as incident to such use.

Error to a judgment of the Corporation Court of the city of Lynchburg on an application to correct an erroneous assessment of real estate. Judgment for the applicant. Commonwealth assigns error.

Affirmed.

The opinion states the case.

Samuel W. Williams, Attorney General, and *Robert D. Yancey,* for the Commonwealth.

Samuel A. Anderson, Harrison & Long, and *Caskie & Caskie,* for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

In a proceeding to correct an alleged erroneous assessment of the real estate of the Lynchburg Young Men's Christian Association it was held that the property assessed was exempt from taxation under the Constitution, and an order was entered by the corporation court of that city exonerating the association from the payment of the tax assessed. To that order this writ of error was awarded upon the petition of the Commonwealth.

It is not controverted here that the property upon which the tax in question was assessed is exempt from taxation if it is actually and exclusively occupied and used by the association for the purposes for which the association was incorporated, viz., "the improvement of the spiritual, mental, social and physical condition of young men and boys." The contention of the Commonwealth is that the whole of the property "is not so occupied and used, but that the

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third and fourth stories of the building in question are entirely occupied as dormitories or bedrooms, which are leased or rented out to occupants for a monthly rental amounting in the aggregate to about $5,000 a year, and that the proceeds of the same are applied to the general purposes of the association."

By section 183 of the Constitution it is declared that, except as otherwise provided therein, no other property than that which is enumerated in that section shall be exempt from taxation. Among the kinds of property enumerated (sub-section "e") is "real estate belonging to and actually and exclusively occupied and used by, and personal property, including endowment funds, belonging to, Young Men's Christian Associations and other similar religious associations, orphan or other asylums, reformatories, hospitals and nunneries, which are not conducted for profit, but purely and completely as charities."

By said section 183 it is further declared that "whenever any building or land, or any part thereof, mentioned in this section and not belonging to the State shall be leased or shall be a source of revenue or profit, all such buildings and land shall be liable to taxation as other land and buildings in the same county, city or town."

The exemptions from taxation provided for by section 183 of the Constitution are in accord with the policy of the State from an early day. The Constitutional Convention, in taking away the power of exemption from the legislature, did not intend to change the old policy of the State on the subject, but placed limitations upon the use of property exempted so as to prevent the perversion or abuse of the liberality of the State.

It is insisted by the Commonwealth that the provision of section 183 of the Constitution must receive a strict construction. The general rule is that provisions exempting property of individuals or private corporations from tax-

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ation must be strictly construed, taxation of such property being the rule and exemption from taxation the exception. One of the reasons for this is that all such persons should bear their fair share of the burdens of taxation, and that lessening the burden of one increases the burdens of others. But as the policy of the State has always been to exempt property of the character mentioned and described in section 183 of the Constitution, it should not be construed with the same degree of strictness that applies to provisions making exemptions contrary to the policy of the State, since as to such property exemption is the rule and taxation the exception.

The real estate of the association consisted of a lot on Church street, in the city of Lynchburg, eighty feet by 132 feet, upon which was erected a five-story building, including the basement, and the whole was valued at $48,000. The use made of the building by the association, as stated by the court in its finding of the facts (the correctness of which is not controverted), are as follows:

"Fourth. That in the basement of this building is a billiard room, tenpin alley, swimming pool and numerous shower and other baths. On the first floor is an office and lobby, a library and reading room and a gymnasium. On the second floor is an auditorium, a boys' department, consisting of a library, reading room and game room, a parlor and several educational class rooms. The third and fourth floors contain dormitories or bedrooms, of which there are forty-five in number.

"Fifth. That the billiard room, tenpin alley, swimming pool and baths are used only by members of the association and their out-of-town guests; for the use of the billiard tables they pay five cents per one-half hour; for the tenpin alley, five cents per game; and for the baths and swimming pool no charge is made. The office is occupied by the secretary and his assistants in and about the work

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of the association. The lobby is open to the public, and no fee of any sort is charged for its use. The gymnasium is used for the various classes in physical culture, taught by a director employed by the association. None but members are allowed these privileges, and no extra charge is made therefor. The auditorium is used for all public meetings, the object and purpose of which is approved by the directors; no rental is charged for its use. None but members of the association are allowed to use the boys' department, and no charge is made or money ever received for the use of this department or any of its privileges. The educational class-rooms are used for the conduct of the night school. No fees are charged for instruction in this school. Some of the pupils do pay very small sums, because they prefer to do so, but these fees do not pay over one-half the cost of conducting the school, and are not compulsory. The dormitories or bedrooms are used by members of the association only. They pay for these rooms from $8.00 to $15.00 per month, according to size and location. These rooms are furnished, and the price paid includes light, heat and janitor services. No one except members who pay fee for full membership can occupy these rooms. The actual amount received from these dormitories is about $5,000 *per annum*. No itemized account of the cost of maintaining them has been kept, and no accurate estimate of the cost of heating, lighting, cleaning or superintending them can be made; it does, however, amount to a considerable sum *per annum*.

"Sixth. Any man or boy over twelve years of age, of good moral character, is eligible to membership. No religious test of any sort is applied. The membership includes Catholics, Jews and all the various Protestant denominations, as well as many persons who are not members of any church. One-third of the directors are elected at the annual meeting each year, at which meeting all the

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members who are members of evangelical churches are entitled to vote, the only qualification for a director being that he must be a member of an evangelical church.

"Seventh. The cost of maintaining the work of this association in its building aforesaid is about $15,000 *per annum;* $5,000 of this sum is collected from persons occupying the rooms or dormitories hereinbefore referred to; the remaining $10,000 is raised from the membership fees and such contributions as may be made by the friends of the association. An annual fee of $10.00 is charged to men who are to be entitled to all the privileges of the association, and for like privileges boys are charged $5.00 or $6.00 *per annum.* Some deduction is made from these sums for persons whose salaries or wages are below a given sum. The association has no capital stock and no provision for making profits or declaring dividends. As a matter of fact, the work of the association is always done at a loss. . . ."

It is not claimed that the association is not occupying and using the basement and the first and second stories of the property in a way which directly promotes the purposes for which the association was incorporated. The question, therefore, to be determined here is whether or not the use made of the third and fourth stories is such as to exclude the property from the exemption provided by the Constitution. If the letting of the rooms in those stories by the association to its members for sleeping or lodging purposes is a renting or leasing of them, the property was not occupied and used exclusively by the association for its purposes within the meaning of the Constitution.

In the case of *Commonwealth* v. *Hampton Institute,* 106 Va. 614, 56 S. E. 594, which involved the question of the right of an educational institution to exemption from taxation under the provisions of section 183 of the Constitu-

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tion, sub-section "d," it was held that property leased to third persons is liable to taxation, although the rents be applied to the educational purposes of the institution.

Mr. Taylor, in his work on Landlord and Tenant (9th ed.), section 66, in discussing the difference between a tenant and a mere lodger, says that the latter is "one who occupies a portion of a tenement which is under the control or in the occupancy of another. He cannot have *trespass quare clausum fregit* if entered upon, and is not liable for rent, or in use and occupation, but can sue and be sued only for a breach of the contract. His agreement is not within the statute of frauds, and his rights do not differ from those of a boarder in a hotel or boarding-house who has no interest in the realty, even though he has a contract for the use of specific rooms."

In *Wansey* v. *Perkins,* 7 Man. & Granger 151, the matter to be determined turned upon the question whether the occupation of one of the parties was that of a mere lodger or that of a tenant. In holding that such occupant was a mere lodger and not a tenant, Chief Justice Tindall, in delivering the opinion of the court, said: "If the premises in the occupation of this claimant were so completely divided from the rest of the house that the landlord had given up all control over them, the case would be different. But here the landlord lets the claimant into possession of the second floor, the landlord retaining possession of the rest of the house. This puts the claimant in the condition of a lodger or inmate."

It was held in *White* v. *Maynard,* 111 Mass. 250, 252, 15 Am. Rep. 28, that an oral contract by the keeper of a boarding house to provide a man and his family for six months with board and lodging, with three specified rooms as lodgings, and to light and heat the same, was not within the statute of frauds because the occupant was a mere lodger and not a tenant.

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The cases generally hold that the occupant of a room or rooms in a tenement is a lodger and not a tenant where the owner retains his character as master of the house, occupying a part of it himself, or by his servants, and at the same time retains the general control over the whole house. See *Cook* v. *Humber,* 11 C. B. N. S. 33; *Brewer* v. *McGowan,* 5 C. P. 239; *Thompson* v. *Ward,* 6 (L. R.) C. B. 327, 360-3; *Wilson* v. *Merton,* 1 Denio 602, 604.

It is clear under the authorities, as it seems to us, that the members of the association who occupy the rooms or dormitories in the third and fourth stories of the building are not tenants or lessees, but mere lodgers. The association, by its officers and servants, occupy a part of the building and it retains the control over the whole of it.

But it is further insisted that, even though the rooms in the third and fourth stories are not leased, they are a source of revenue and profit to the association.

If the dominant purpose in the use made of these rooms is to obtain revenue or profit, although it is to be applied to the general objects of the association, it would render the property liable to taxation. But if the use made of those rooms has direct reference to the purposes for which the association was incorporated, and tends immediately and directly to promote those puropses, then its use is within the provisions exempting the property from taxation, although revenue or profit is derived therefrom as incident to such use.

In the case of *Commonwealth* v. *Hampton Institute, supra,* it was held, that "Hemenway" farm was not liable to taxation, although revenue or profit was derived from the use made of the farm. One of the grounds upon which that conclusion was rested was that the institute had the right to establish a model farm for scientific instruction in the dairy business, and that in so using the farm as that it produced revenue or profit which went into the

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treasury of the school did not render it liable to taxation, since deriving revenue or profit was a mere incident and not the object in view in so using the farm. The view taken in that case is in accord with the weight of authority in other jurisdictions.

In *Emerson* v. *Miller Academy,* 185 Mass. 414, 70 N. E. 442, where substantially the same question was involved as is now being considered, it was held that where the occupation and use of real estate was to produce income to be expended for the purposes for which the educational institution was incorporated, it was not within the statute exempting the property from taxation, but where the dominant purpose in the occupation and use of the property was directly to accomplish some of the objects for which the corporation was established, it was within the provision of the statute. The fact that incidentally there were results from the use of the property which would not entitle it to exemption was held to be immaterial, so long as the dominant purpose of the occupation was within the statute. In that case the real estate of the educational institution was used for dwelling houses of teachers of the academy, with their families, as an aid in preserving discipline and bringing about closer relations with the pupils, the use being allowed as a part of the compensation to the teachers. It was held that such use of the property did not take it out of the protection of the statute, since the dominant purpose of the use or occupation was in promotion of the purposes for which the academy was incorporated.

In *Yale University* v. *Town of New Haven,* 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 490, where the statute provided that "buildings or portions of buildings exclusively occupied as colleges, academies, churches, public school houses, or infirmaries" should be exempt from taxation, it was held that fees of students, whether apportioned as room rent or

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tuition, could not be treated as income of real estate. In discussing the question the court said: "The fact that certain sums are paid for the use of the rooms occupied does not alter the character of the occupation. A church is none the less a church because the worshipers contribute to the support of the services by way of pew rent. A hospital is none the less a hospital because the beneficaries contribute something towards its maintenance. And a college is none the less a college because its beneficiaries share the cost of maintenance; and it is immaterial whether such contribution is lumped in one sum or apportioned to sources of expense, as tuition, room rent, lecture fees, dining hall," &c. See also generally on the subject *Linton* v. *Lucy Cobb Inst.,* 117 Ga. 678, 45 S. E. 53; *Philadelphia* v. *Women's Christian Association,* 125 Pa. 572, 17 Atl. 475; *Davis* v. *Camp Meeting Assn.,* 57 Ohio, 257, 49 N. E. 401; *Mount Herman Boys' School* v. *Inhabitants of Gill,* 145 Mass. 159, 13 N. E. 354.

It cannot be said in this case that the dominant purpose of the managers of the Lynchburg association, in the occupation and the use made of its building, the third and fourth stories as well as the basement and other stories, was not to accomplish, and did not tend directly and immediately to accomplish, the object for which the association was incorporated and existed. Some of the objects of the association, as stated in the facts found by the trial court, were improvement of the spiritual, mental, social and physical condition of young men and boys, and to this end it maintains the building (which it is now sought to tax) on Church street, between Tenth and Eleventh streets, in the city of Lynchburg, which is in charge of a secretary and corps of assistants, who, together with the necessary janitors and other employees, are employed and paid by the association. The secretary and his assistants seek out young men and boys and endeavor to bring them under

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moral and religious influences, to secure their attendance at some place of worship, to introduce them to the members and privileges of the association, to aid them in selecting suitable boarding houses and employment, and by every possible means surround them with Christian influences. The association maintains a library and reading room, where good books, the daily papers, and a large number of magazines are at the disposal of the members. . . . During the week Bible classes are taught in this building; large numbers of young men being gathered in these classes, who engage in the regular and systematic study of the Bible. . . . The association maintains a regular night school, where certain nights in each week reading, writing, arithmetic, penmanship, bookkeeping and other common school branches are taught to such young men and boys as are employed during the day."

Manifestly, a member of the association who was a lodger or inmate of the building would be in a better situation to take advantage of the privileges offered by the association, and more likely to take advantage of them, other things being equal, than a member who lodged elsewhere.

The court is of opinion that there is no error in the order complained of, and that it should be affirmed.

Affirmed.

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Richmond

COMMONWEALTH, AT THE RELATION OF DOWDEN, v. RICHMOND AND RAPPAHANNOCK RIVER RAILWAY COMPANY.

January 15, 1914.

1. STREET RAILWAYS—*Discontinuance of Transfers—Advertising Under Section 1033-f of Code.*—Section 1033-f of the Code (1904), which provides that before granting any franchise, privilege, lease or right of any kind to use any public property or easement, except a trunk railway, it shall be the duty of the city or town proposing to make the grant to advertise the ordinance, etc., in a newspaper published in such town or city for four successive weeks, has no application to a city ordinance which simply repeals a prior ordinance, requiring two street railway companies to give transfers over each other's lines.
2. STREET RAILWAYS—*Advancing Rates—Rates Fixed by City Ordinance—Code, Section 1294-c (6)—Constitution, Section 156-b.*—Section 1294-c (6) of the Code (1904), providing that "no advance shall be made in the rates, fares and charges of public service corporations until the same have been submitted to and approved by the State Corporation Commission," must be read in connection with section 156-b of the Constitution, which gives to cities, towns and counties the right to prescribe rules, regulations and rates of charge to be observed by public service corporations in connection with any services performed by them under a municipal or county franchise granted by such city, town or county so far as such services may be wholly within the limits of the city, town or county granting the franchise. So, reading the two, the statute must be construed to apply to rates which are not lawfully and definitely fixed by contract and which need the approval of the State Corporation Commission, whereas the rates and transfer privileges involved in the case at bar are fixed by municipal ordinance, embodying a definite contract.
3. STREET RAILWAYS—*Transfers Compelled by City Ordinance—Change of Ordinance.*—Where the privilege of transfer from one street railway to another without additional charge has been lawfully created by a valid city ordinance, and a subsequent ordinance

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relieves the railway companies of the obligation to furnish such transfers, the privilege ceases.

4. STREET RAILWAYS—*Wholly in City Limits—Rates Fixed by City Councils.*—The councils of the city of Richmond are vested by the Constitution with legislative discretion when prescribing rules, regulations and rates to be observed by street railway companies in connection with services performed under the franchise to use the streets of the city granted by the councils, so far as such services are wholly within the limits of the city, and the State Corporation Commission has no jurisdiction or power to supervise or annul their action in that respect.

5. STREET RAILWAYS—*Connecting Lines—Lines in and Out of City Limits—Rates—Transfers—Jurisdiction of State Corporation Commission.*—While the State Corporation Commission has full and complete jurisdiction to prescribe rules, regulations and rates for an electric railway lying wholly outside of the city of Richmond and connecting at the corporate limits with a street railway lying wholly within said city, it would be unjust and inequitable to compel the former to accept transfers from the latter when the city councils have relieved the latter of the obligation to accept transfers from the former and it declines to give such transfers.

6. STREET RAILWAYS—*Connecting Lines—Transfers—Motives in Refusing.*—The interests and motives of two street railway companies having connecting lines in discontinuing transfers from one line to the other cannot affect the legal rights of patrons of the lines. The sole question is whether the companies are within their legal rights in discontinuing such transfers.

Appeal from the State Corporation Commission.

Affirmed

The opinion states the case.

George Bryan, T. A. Wickham and *Maurice A. Powers,* for the appellant.

A. B. Guigon, Thos. P. Bryan and *H. W. Anderson,* for the appellees.

HARRISON, J., delivered the opinion of the court.

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This case is before us on an appeal from an order of the State Corporation Commission. For some years prior to this proceeding the predecessors in title of the appellee companies issued transfers to passengers traveling in either direction at Twenty-ninth and P streets in the city of Richmond. These transfers entitled the passenger coming into the city to travel upon the cars of the Virginia Railway and Power Company to any point on its line in the city, and, if going in the other direction, to travel on what is now the Richmond and Rappahannock River Railway Company's line into the county of Henrico to Seven Pines, a distance of about seven miles from the city limits. This privilege of transfers at the point mentioned was extended in pursuance of an ordinance of the city of Richmond, dated December 23, 1899, the provisions of which constituted a contract between the companies and the city, which imposed upon the former an obligation to issue such transfers. *Va. Passenger & Power Co.* v. *Commonwealth,* 103 Va. 644, 49 S. E. 995. Since that time the line from the city limits to Seven Pines has become the property of the appellee, the Richmond and Rappahannock River Railway Company, and the line within the city limits is now owned by the appellee, the Virginia Railway and Power Company.

For reasons satisfactory to itself the city of Richmond, through its council, passed ordinances dated, respectively, February 17, 1912, and May 8, 1912, amending the ordinance of December 23, 1899, so as to forever relieve and release the appellees from all obligation to furnish the transfers in question.

The first contention of the appellant is that under section 1033-f of the Code of 1904 it was necessary to the validity of the ordinance of February 17, 1912, that it should have been preceded by an advertisement once a week for four successive weeks, and that the rights thereby granted should have been exposed by the city council to public bidding.

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This position is not well taken. The section relied on provides that, before granting any franchise, privilege, lease or right of any kind to use any public property or easement, except a trunk railway, it shall be the duty of the city or town proposing to make the grant to advertise the ordinance, etc., in a newspaper published in such town or city for four successive weeks. It is clear that this statute has no application to the present case, and, therefore, compliance with it was not necessary. By the ordinances of February 17 and May 8, 1912, the council did not grant any franchise, privilege, lease or right of any kind to use any public property or easement of any description, as set forth in the language of the statute relied on. The ordinances of 1912 merely changed the contract so as to relieve the companies from the obligation of issuing transfers to and from points on the Seven Pines line outside of the city. The city of Richmond had by its ordinance of December, 1899, required of the predecessors in title to the appellees the duty of furnishing these transfers, and that contract was enforced. *Va. P. & P. Co.* v. *Com'th, supra.* The city had the right to make that contract and had an equal right to modify its terms by forever releasing the present owners from the obligation to furnish the transfers in question. So far as the present controversy is concerned, this is all that was intended to be and all that has been accomplished by the ordinances of 1912, and to that end no invitation to bidders was required, nor was it necessary to advertise the amended ordinances for four successive weeks.

The statute further provides as follows: "And no amendment that releases the grantee or his assignee from the performance of any duty required by the ordinance granting the franchise, or that authorizes an increase in the charges to be made by such grantee or assignee for the use by the public of the benefits of such franchise, shall be granted

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unless or until notice of such proposed amendment shall be given to the public by advertising the proposed amendment for ten days in some newspaper published in the city or town."

This provision of the law was strictly complied with before the amendments of 1912 were adopted, and constituted all that was necessary to be done to make those amendments valid and effectual.

The second and only other proposition submitted by the petition for appeal is that under section 1294-c of the Code application should have been made to the State Corporation Commission, after ten days' publication, for leave to advance the fares on the Seven Pines line, and that leave formally obtained.

In answer to this contention the Corporation Commission says: "The clause referred to reads as follows:

" '(6) No advance shall be made in the rates, fares and charges which have been established as aforesaid, until the same are submitted to and approved by the State Corporation Commission, and when so advanced ten days' notice thereof shall be given, which shall plainly state the changes made in the schedule then in force, and the time when the increased rates and fares and charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time, and kept open to public inspection.'

"This statute, however, must be construed in connection with the proviso contained in section 156-b of the Constitution. This is the section which gives this commission the power and charges it with the duty of supervising and controlling transportation companies in this State, with authority to fix their rates, rules and regulations. This proviso reads as follows:

" 'Provided, however, that nothing in this section shall

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impair the right which has heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limits of the city, town or county granting the franchise.'

"If there be any conflict between this constitutional provision and the statute, 1294-c (6), of course the constitutional provision is the superior law and must prevail.

"We do not, however, think that such a conflict exists. The statute must be construed to apply to rates which are not lawfully and definitely fixed by contract and which must need the approval of this commission, whereas the rates and transfer privileges here involved are fixed by a municipal ordinance, embodying a definite contract. The matter involved is the exchange of transfers in the city of Richmond, at Twenty-ninth and P streets, that being the point of connection between the two railway lines. We have here, then, a contract legally entered into and lawfully modified by the municipal authorities of the city of Richmond, and while the privileges of persons traveling from Seven Pines into the city are thereby curtailed, still these privileges were originally derived from the ordinance of December 23, 1899, and without that ordinance could never have been demanded. The ordinance, having been thus amended, the privilege no longer exists.

"This commission has no jurisdiction or power to supervise or annul the action of the city authorities under the circumstances developed in this case. The city councils are by the Constitution vested with legislative discretion when prescribing rules, regulations or rates of charge to be observed by these companies in connection with services

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performed under the franchise to use the streets of the city granted by the councils, so far as such services are wholly within the limits of the city. The service of the Virginia Railway and Power Company, so far as it relates to the transfers referred to, is performed entirely within the city of Richmond. So far as the service of the Richmond and Rappahannock River Railway Company with reference thereto between the city limits and Seven Pines is concerned, it is undoubtedly true that this commission has full and complete jurisdiction. This service, however, is so dependent upon the corresponding service of the Virginia Railway and Power Company within the limits of the city that it would be unjust and inequitable to require the Richmond and Rappahannock River Railway Company to accept and honor transfers held by travelers leaving the city, when the city council has relieved the Virginia Railway and Power Company from the obligation to accept transfers from travelers entering the city."

It is unnecessary to add anything to what is here said in order to show the fallacy of the second contention of the appellant.

It is insisted that the Corporation Commission, in disposing of this second contention, held that it did not have jurisdiction of the case, and that, therefore, it had no right to decide the first question submitted by the appellant. This is a mistaken view. If the first contention of the appellant had been sustained, that would have ended the case. It was proper, therefore, to dispose of that question before the second was reached. Moreover, the commission, in disposing of the second contention, did not decline to take jurisdiction of the case, but held that, under the Constitution and laws of the State, the city council was vested with legislative discretion to prescribe rules, regulations and rates of charge to be observed by companies using its streets under a franchise granted by the city,

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where such service was wholly within its limits, and that the commission had, therefore, no jurisdiction or power to supervise or annul the action of the city authorities under the circumstances developed in this case.

Much is said in behalf of the appellant about the alleged community of interest, between the two appellee companies and the motive actuating them in discontinuing the transfers at the point mentioned. The answers of the companies deny the alleged community of interest, and the evidence wholly fails to support the allegation that any such interest exists. The interests and motives of the appellee companies cannot, however, affect the legal rights of the parties to this case. The sole question here is, whether the ordinances and the action of the appellees complained of are within the law of the Commonwealth. The conclusion of the Corporation Commission, that neither of the two contentions of the petitioner could be sustained and that his petition should be dismissed, was plainly right, and its order to that effect, which is here complained of, must be affirmed.

Affirmed.

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Richmond.

CRAIG v. CRAIG.

January 15, 1914.

1. APPEAL AND ERROR—*Divorce—Counsel Fees.*—On an appeal from a decree dismissing a bill for divorce, and also dismissing a cross-bill of the wife for alimony, this court, on affirming the decree, will not pass on an application for the allowance of counsel fees for services rendered the appellee in this court, but will remand the cause, with leave to counsel for the appellee to prosecute their claim for compensation before the trial court, which is in a better position than this court to inquire into and do what is right and just between the parties in the first instance, with the right of appeal to this court if a proper case shall be made for its exercise.

Appeal from a decree of the Law and Equity Court of the city of Richmond. Decree for defendant. Complainant appeals.

Affirmed.

The opinion states the case.

S. S. P. Patteson, for the appellant.

Smith & Gordon and *James F. Minor,* for the appellee.

KEITH, P., delivered the opinion of the court.

The appellant filed his bill in this case, asking for a divorce from his wife upon the ground of adultery. He makes the person with whom she is alleged to have been guilty of the offense a party defendant as co-respondent. The wife filed an answer, which, she asks, may be treated as a cross-bill, in which she charges the husband with not furnishing her with means of support and with abandonment and cruelty, and asks that permanent alimony be

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awarded her for the support of herself and her child. The husband answered this cross-bill and put in issue the charges which it contains; and upon the issues made by the pleadings numerous depositions were taken, and the case came on to be heard before the law and equity court of the city of Richmond. That court being of opinion "that the evidence is not sufficient to sustain the charge of adultery against the defendant in the plaintiff's bill, it is adjudged, ordered and decreed that the plaintiff's bill be, and the same is hereby, dismissed. And the court being further of opinion that the evidence is insufficient to enable the court to pass upon the issues raised by the cross-bill filed by the defendant and the answer of plaintiff thereto, and that therefore the allegations in the cross-bill have not been proved so as to entitle the defendant to affirmative relief thereon, it is ordered that the cross-bill of the defendant be dismissed."

From that decree an appeal was allowed to this court.

The evidence is not of a character that we care to discuss. No good purpose would be subserved by its discussion, and we shall, therefore, content ourselves with saying that, after careful consideration of the evidence, we are of opinion that there is no error in the decree of the law and equity court.

Counsel for appellee have asked that an allowance for counsel fees be made for services rendered in this court. This we decline to do, being of opinion that the trial court is in a better position to inquire into and do what is right and just between the parties in the first instance than this court. We shall, therefore, affirm the decree and remand the cause, but with leave to counsel for appellee to prosecute their claim for compensation before the law and equity court in the first instance, with the right of appeal to this court if a proper case shall be made for its exercise.

Affirmed.

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Richmond

JOHN DIEBOLD & SONS' STONE COMPANY v. TATTERSON, EXECUTRIX, AND OTHERS.

January 15, 1914.

1. MECHANIC'S LIEN—*Affidavit of Agent—Sufficiency—Case in Judgment.*—At the end of an itemized account for a mechanic's lien are these words: "After deducting the credits from the debits, leaves the balance, $7,041.93, due to John Diebold & Sons' Stone Company, Inc., with interest thereon from the 6th day of January, 1911, until paid. (Signed) John Diebold, President and Agent for John Diebold & Sons' Stone Co., Inc., Affiant." Immediately following this is the certificate of the notary, which says: "Personally appeared before me, in my city aforesaid, Mr. John Diebold, and made oath that the matters and things stated in the foregoing account are true, and that the said account is correct."

   Held: It sufficiently appears that the affiant was acting as the agent of the corporation claiming the mechanic's lien, and the affidavit is sufficient to support said lien.

2. EQUITY—*Report of Commissioner in Chancery—Weight Given to.*—Reports of commissioners in chancery are *prima facie* correct and objection must be made to them. When this is done, it is the duty of the court to examine the evidence returned by the commissioner, and upon which his conclusions are based, and review his conclusions. If the evidence consists of depositions which have been taken by the commissioner, or in his presence, and is conflicting, and his conclusions are clearly supported by competent and unimpeached witnesses, his report will not be disturbed, unless it is clear that the weight of the testimony is contrary to his conclusions. But, even in such case, the court will review and weigh the evidence, and, if not satisfied with the findings of the commissioner, will overrule them. The report will only be accepted as conclusive when the testimony, though conflicting, is evenly balanced, and the report is supported by the testimony of competent and unimpeached witnesses.

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Appeal from a decree of the Circuit Court of the city of Norfolk. Decree for defendants. Complainants appeal.

Reversed.

The opinion states the case.

Jeffries, Wolcott, Wolcott & Lankford and *John A. Beacher,* for the appellant.

John B. Jenkins, Willcox, Cooke & Willcox, E. R. F. Wells and *James G. Martin,* for the appellees.

KEITH, P., delivered the opinion of the court.

John Diebold & Sons' Stone Company, Incorporated, presented its petition to this court, in which it is alleged that it has been aggrieved by the decree of the circuit court of the city of Norfolk in a certain chancery suit therein pending, wherein the petitioner was plaintiff and Lizzie M. Tatterson, executrix of the last will and testament of E. Tatterson, deceased, and others were defendants.

The petitioner was a sub-contractor under Tatterson, general contractor, to furnish stone and stone work to be used in a church building in the city of Norfolk for W. W. Old, Walter H. Taylor, and others, trustees of Christ Protestant Episcopal Church; that as sub-contractor there was due to the petitioner the sum of $7,041.93, with interest from the 6th day of January, 1911; that on the 20th day of May, 1911, petitioner notified the trustees of its intention to claim the benefit of a mechanic's lien upon the property. Upon the same day upon which this notice was given, the petitioner filed in the clerk's office of the corporation court of the city of Norfolk a mechanic's lien for the debt against the church property. It is also al-

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leged in its bill that at the time the notice was served upon the trustees they were indebted to Tatterson, the general contractor, for an amount sufficient to satisfy the claim of petitioner.

The trustees filed their answer to this bill, admitting that they were indebted to Tatterson, the general contractor, in the sum of $5,071.95, subject to a credit for damages caused by delay. On March 15, 1912, a decree was entered referring the case to a master commissioner for a report of the amount due and owing by the trustees to the contractor, and an account of the liens upon the land and building, as well as upon the fund due by the trustees to the contractor. The commissioner reported that petitioner had proven the amount due to it to be $7,033.93, with interest from March 19, 1911, subject to a credit of $834.70 for cutting stone and $300 for delay, leaving a balance of $5,899.23, which he reported to be a valid mechanic's lien against the property.

Exceptions were taken by sundry creditors to this report, and petitioner excepted to it because of the allowance of the credits above mentioned. On July 29, 1912, the court entered a decree overruling the exceptions taken by petitioner, and without passing on the other exceptions taken by the other parties to the allowance of peititoner's claim, sustained the exception based upon the ground that no sufficient affidavit had been filed with the account, and that, therefore, its lien was invalid.

The sole question, therefore, before this court is as to the sufficiency of the affidavit, and as to the propriety of the credits allowed as against petitioner by the decree complained of.

The account which was filed with petitioner's mechanic's lien is as follows:

"An account showing the amount and character of the work done and materials furnished by John Diebold &

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Sons' Stone Company, Inc., sub-contractors under E. Tatterson, general contractor, for the construction and erection of Christ Protestant Episcopal Church, Elizabeth River Parish, Norfolk, Virginia, the prices charged therfor, the payments made, and the amounts due."

Then follows the itemized account, at the end of which are these words:

"After deducting the credits from the debits, leaves the balance of $7,041.93 due to John Diebold & Sons' Stone Company, Inc., with interest thereon from the 6th day of January, in the year 1911, until paid.

(Signed) "JOHN DIEBOLD,

"President and Agent for John Diebold & Sons' Stone Company, Inc., Affiant."

Immediately following this is the certificate of the notary, which says:

"Personally appeared before me, in my city aforesaid, Mr. John Diebold, and made oath that the matters and things stated in the foregoing account are true, and that the said account is correct."

The commissioner having reported in favor of the lien of the petitioner, it was excepted to by other claimants upon the ground that the account showing the amount and character of the work and labor done and the balance due is not verified by the owner or his agent.

The question involved in this exception has been frequently before this court in the last few years.

The first case is *Merriman Co.* v. *Thomas,* 103 Va. 24, 48 S. E. 490, in which section 3286 of the Code is considered, which section provides: "In an action of assumpsit on a contract, express or implied, for the payment of money (except where the process to answer the action has been served by publication), if the plaintiff file with his declaration an affidavit made by himself or his agent, stating therein, to the best of the affiant's belief, the amount of the plaintiff's claim, that such amount is justly due, and

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the time from which the plaintiff claims interest, no plea in bar shall be received in the case, either at rules or in court, unless the defendant file with his plea the affidavit of himself or his agent, that the plaintiff is not entitled, as the affiant verily believes, to recover anything from the defendant on such claim," etc. The affidavit in that case was made by the bookkeeper of the firm, and the court held that the statute requires the affidavit of the plaintiff or his agent, and, in the absence of evidence on the subject, a bookkeeper will not be held to be such agent; for, said the court, "while a bookkeeper may be, and often is, the agent of his employer, the word does not, *ex vi termini*, import that relation, and, in the absence of averment in the affidavit that it exists, the courts cannot by intendment enlarge the ordinary signification of the word so as to bring it within a class to which it may or may not belong."

In *Taylor* v. *Sutherland-Meade Tobacco Co.*, 107 Va. 787, 60 S. E. 132, it was held that an affidavit made by the secretary and treasurer of a corporation is not a sufficient compliance with the statute which requires an affidavit to be made by the plaintiff, his agent or attorney, for the court cannot say, as a matter of law and in the absence of averment, that the term "secretary and treasurer" necessarily imports the relation of agency between such officer and his corporation within the intendment of the attachment laws of this State. "If he is in fact such agent, it should be so averred in the affidavit. Attachment laws being in derogation of the common law and harsh in their application, substantial compliance with their requirements must be made to appear on the face of the proceedings."

In *Clement* v. *Adams Bros., &c.*, 113 Va. 547, 25 S. E. 294, the sufficiency of an affidavit to a mechanic's lien was considered, and the preceding decisions upon the general subject were reviewed, and it was held that the president of a corporation is not merely by virtue of his office the

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agent of the corporation to make affidavit to a mechanic's lien, and unless the affidavit avers that he is in fact the agent of the corporation for that purpose, the lien is not protected, and, therefore, does not exist. The making of such an affidavit is not one of the implied powers of a president.

Those decisions must be interpreted in the light of the facts upon which they were based. In none of them is there anything in the contract to which the court could look in aid of the affidavit. There was nothing either by way of averment or proof to throw light upon the situation, and the court was held down to the terms of the affidavit itself to ascertain its true intent and meaning. But the court said, in *Taylor* v. *Sutherlin-Meade Co., supra,* that attachment laws, being in derogation of the common law, and harsh in their application, substantial compliance with their requirements must be made to appear on the face of the proceedings. Even in the instance of laws admitted to be harsh in their application, the court only requires a substantial and not a literal or verbal compliance with the statute.

In the case before us the instrument or paper upon which the account appeared, purporting to show the amount and character of work done and materials furnished by petitioner to appellee, uses the following language: "After deducting the credits from the debits, leaves the balance of $7,041.93 due to John Diebold & Sons' Stone Company, Inc., with interest thereon from the 6th day of January, in the year 1911, until paid. (Signed) John Diebold, President and Agent for John Diebold & Sons' Stone Company., Inc., Affiant." Immediately following this is a certificate which says: "Personally appeared before me, in my city aforesaid, Mr. John Diebold, and made oath that the matters and things stated in the foregoing account are true, and that the said account is correct." We naturally turn from the affidavit—indeed, one necessarily

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turns from the affidavit to the paper to which the affidavit is annexed—and we cannot close our eyes to the fact that it is signed "John Diebold," not in his proper person, but as the president, and not alone as the president of the company which he represents, but as the *agent* also, and in that capacity he is the affiant, and the affidavit following it is the affidavit of John Diebold, the president, and of John Diebold, the agent, who is the affiant to the account rendered and the truth of which is verified by his oath.

But further, looking critically to the *jurat* or affidavit, it will be observed that the word "account" is used twice, and, dealing with them inversely, it will be observed that the affiant swears that the account is correct, which standing alone might be forcibly argued as referring only to the items and figures used in the account, but it does not stand alone. He makes oath not only that the account is correct, but that "the matters and things stated in the foregoing account are true." And what are the "matter and things" stated in the foregoing account which are to be superadded to the oath as to the correctness of the account itself and its mere items and figures? The word "account" has more than one meaning. It is a reckoning or computation or written or printed statement of facts and occurrences, a recital of transactions, which would give it a broader meaning. The word "matters" is defined to be that with regard to or about which anything takes place or is done; the thing aimed at, treated of, or treated; the subject of action, discussion, consideration; and the word "thing" is defined as a transaction, or occurrence. Webster's Dict.

It would be narrow in the extreme were we to close our eyes to what plainly appears upon the face of the paper. Not only must we look at what is there presented, but we must give effect to every word there used; and, dealing with it in that spirit, we find no difficulty in differentiating

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this case from those upon kindred questions to which we have referred, and in reaching the conclusion that the affidavit was sufficient to support the claim of a mechanic's lien.

With respect to the exceptions to the commissioner's account allowing certain credits, we are of opinion that the decree in that respect is without error.

In *Shipman* v. *Fletcher,* 91 Va. 473, 22 S. E. 458, in which Judge Riely reviewed the decisions bearing upon the weight to be given the reports of commissioners in chancery, it was held that they are *prima facie* correct, and that objection must be made to them by exceptions; that when this is done it is the duty of the court to examine the evidence returned by the commissioner, and upon which his conclusions are based, and review his conclusions. If the evidence consists of depositions, and has been taken by the commissioner or in his presence, and is conflicting, and his conclusions are clearly supported by competent and unimpeached witnesses, his report will not be disturbed, unless it is clear that the weight of the testimony is contrary to his conclusions. But, even in such case, the court will review and weigh the evidence, and, if not satisfied with the findings of the commissioner, will overrule them. The report will only be accepted as conclusive when the testimony, though conflicting, is evenly balanced, and the report is supported by the testimony of competent and unimpeached witnesses."

Viewing the testimony in the light of these principles, we are of opinion that there was no error in the decree appealed from, which overrules appellant's exceptions to the commissioner's report.

We are, therefore, of opinion that the decree of the circuit court must be reversed, and this court will render such decree as the circuit court should have entered.

Reversed.

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Richmond

EICHELBERGER v. MANN.

January 15, 1914.

1. CORPORATIONS — *Organization Meeting — Absence of Subscriber — Waiver.*—If a subscriber to the stock of a corporation was not present or represented at the organization meeting, and did not waive in writing notice of the meeting, as provided by section 1105-a (4) of the Code (1904), his absence only rendered the proceedings voidable as to him, and he could subsequently waive the irregularity and ratify the proceedings, as was done in the case at bar.
2. PLEADING—*Motion Under Section 3211 of Code—Stock Subscription.*—An unconditional and unqualified promise to pay for stock in a corporation, as and when called for by the board of directors, may be enforced by a motion under section 3211 of the Code.
3. CORPORATIONS—*Stock Subscription—Release—Collateral Agreement With Third Person.*—It is no defense to a written subscription to stock in a corporation that the subscriber had a collateral agreement with two of the promoters of the corporation in their *individual* capacities only that under certain contingencies they would take the stock off his hands. Such a private arrangement between parties in their own behalf, concerning which neither the corporation nor other subscribers had notice, is in no way binding upon them.
4. CORPORATIONS—*Stock Subscription—Release—Agreement With Another Stockholder—Accord Without Satisfaction.*—An agreement to release a stockholder from his subscription upon certain conditions is not binding upon the company where it appears that the alleged agreement was not made with the stockholders as a whole, or with the board of directors, but with certain individual stockholders, acting upon their own initiative and without authority to release the subscriber from his stock subscription. A stockholder has no power to bind a corporation unless he is its authorized agent. In the case at bar, if any such agreement was made, it was not proved that it was performed by the subscriber, and an accord without satisfaction is not sufficient.

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Error to a judgment of the Circuit Court of Chesterfield county in a proceeding by motion for a judgment under section 3211 of the Code. The corporation which held the stock subscription assigned the same, for value, to James Mann, who instituted this proceeding in his own name. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Willis B. Smith and *Samuel W. Zimmer,* for the plaintiff in error.

Sale, Mann & Tyler, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

On motion, under section 3211 of the Code, the defendant in error, plaintiff below, as assignee of the Centre Hill Corporation, recovered judgment for $1,000 against the plaintiff in error, the defendant, on his subscription to ten shares of the capital stock of the corporation. The case is before us on writ of error to that judgment.

The first three assignments of error practically depend upon the same ground of defense, viz: that there was no absolute contract of subscription made by the defendant to the stock in question.

1. The first contention is that the evidence only shows an agreement on the part of the defendant to subscribe to stock of a corporation to be formed in future; and that, inasmuch as at the time of the institution of this proceeding section 3211 limited the remedy by motion to the recovery of money due by contract and did not authorize the recovery of damages for a mere breach of contract, this motion could not be maintained, and should have been dismissed. *Wilson* v. *Dawson,* 96 Va. 687, 32 S. E. 461.

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2. The propriety of the court's ruling under the first assignment of error depends upon the correctness of its action with respect to the second assignment, namely, that it erred in denying the motion of the defendant to strike out all of the plaintiff's evidence tending to show the acceptance by the corporation of the defendant's subscription to the stock; the contention in that regard being that it appeared from plaintiff's own evidence that the initial meeting of the subscribers was illegal, and, therefore, that the corporation had never been legally organized.

Section 1105-a (4) of the Code provides that the subscribers shall give ten days' notice of the organization meeting, unless all the shareholders are present or represented, or unless notice of the meeting is waived in writing by such of the subscribers as are absent.

All the subscribers, in this instance, were present at the meeting, except defendant, and he was notified of the meeting by telephone on the day it was held. The evidence (considered as upon a demurrer to the evidence) also tended to show that the defendant authorized the secretary of the meeting to represent him; but if such was not the case, it appears that on June 25, 1910, nine days after the initial meeting was held, the defendant executed a general proxy in writing, appointing the secretary attorney-in-fact to represent his interest in the corporation and the stock subscribed for by him in any and all meetings of the incorporated stockholders, which power of attorney related back to and in terms covered the organization meeting held on June 10, 1910. So that if, as the defendant claims, he was not personally present or represented at the first meeting, his absence only rendered the proceedings voidable as to him, and the effect of the power of attorney subsequently executed was to waive the irregularity and ratify the proceedings. The trial court, therefore, did not err in overruling the motion of the defendant to reject the plaintiff's evidence.

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3. The next ground of error involves the action of the court in rejecting certain evidence on behalf of the defendant.

The effect of that evidence, if true, was to establish a collateral agreement between the defendant, on the one part, and Arthur Kyle Davis, a promotor of the company, and his brother, Charles Hall Davis, *each acting in his individual capacity only,* on the other, to the effect that the Davises, under certain contingences, would take the stock off his hands. In this transaction these parties in no way represented the corporation or other stockholders. It was a private arrangement between parties acting in their own behalf, and concerning which neither the corporation nor other subscribers had notice, and which was in no way binding upon them. 10 Cyc. 414, 434.

In these circumstances, the court, having carefully considered the evidence, correctly held that it constituted no defense to the action, and therefore sustained the motion of the plaintiff to reject it. On the other hand, the written subscription agreement made by the defendant is an unconditional and unqualified promise to pay for the ten shares of stock, "as and when called for by the board of directors of said corporation."

4. The fourth and last assignment of error which demands consideration is founded upon the court's action in excluding certain evidence offered by the defendant to prove a conditional purchase by him of a Centre Hill lot in discharge of his liability on the stock subscription.

This defense was relied on as an accord and satisfaction, but the alleged agreement was not made with the stockholders as a whole, or with the board of directors, but with certain individual stockholders, acting upon their own initiative and without authority to release the defendant from his stock subscription.

The principle is elementary that a stockholder has no power to bind a corporation unless he is its authorized

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agent. Besides, if the evidence were held sufficient to establish a valid accord, it would have constituted no defense, because it failed to show a satisfaction. In other words, it was not proved that the defendant ever purchased a lot as stipulated in the alleged agreement. An accord without satisfaction is insufficient. 1 Am. & Eng. Enc. of Law, 422.

For the foregoing reasons we are of opinion that the judgment of the circuit court is without error and should be affirmed.

Affirmed.

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Richmond

HADEN v. FALLS AND OTHERS.

January 15, 1914.

1. SPECIFIC PERFORMANCE—*Contingent Right of Dower—Refusal to Convey—Objection on Other Grounds.*—In the absence of any allegation of fraud, a court of equity will not, at the instance of the vendee, decree the specific performance of a husband's contract to sell his land, in which his wife has a contingent right of dower, which she refuses to release, where the purchaser demands an abatement of the purchase price or an indemnity by reason of such refusal; and, where specific performance is resisted on other grounds, it is immaterial that this objection is not made in the answer. The same weight will be given to it as if it had been distinctly and formally presented. The wife is not to be wrought upon by her love for her husband and sympathy in his situation to do that which her judgment disapproves as contrary to her interest, nor is he to be tempted to use undue means to procure her consent.

Appeal from a decree of the Circuit Court of Campbell county. Decree for the defendants. Complainant appeals.

Affirmed.

This suit was brought by M. D. Haden, the appellant, against W. T. Falls and others to compel the specific performance of an agreement to sell or exchange certain real and personal property. The agreement is in the form of an offer made on the 6th day of February, 1912, and accepted on the next day, and is in the following language:

"2/6/12.

"M. D. Haden, Esq.,

"Lynchburg, Va.—

"Dear Sir:

"Concerning the negotiations which I have heretofore taken up with you, I wish to make you the following offer:

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Statement.

"I hereby offer to sell you my 42½ acres or less of land (this being in gross and not by the acre) near Concord, lying partly in Campbell and partly in Appomattox county, Virginia, which I bought from Walter G. Jones and wife on, to-wit, August 10, 1911. This land has on it a deed of trust of $2,000 in which F. W. Whittaker is trustee.

"Also, I hereby offer to sell you the following personal property: One 30 H. P. Frick Engine and Boiler complete with all fixtures, situate on the property of Mr. Dameron in West Lynchburg, on Forest road, Campbell county, Virginia; one Lane mill complete, at same place; four kant hooks; two crab hooks; one road chain; one log chain; one Henry Ditson 50" saw, one 10" cross-cut saw; all tools and wrenches that belong to the mill.

"The above personal property has a lien on it held by the Virginia Interstate Land Agency for about $440.00, which is the only lien against the personal property, and in the event my offer is accepted, that lien will be released, and, if there are any other liens, they also will be released.

"In addition to the foregoing offer to sell you the real estate and personal property above, and as a part of this agreement or offer, I agree to pay the costs of the suit of yourself against the Virginia Interstate Land Agency and others for a receivership, and also the attorney's fee incurred by you in said litigation (amounting in all to $108.29), and you, upon my complying with the foregoing offer, are to do the following things:

"You are to assume $2,000.00 of the debt now secured by deed of trust on the real estate above mentioned, I to pay the interest to date of the deed to you and the apportionate taxes as of that date, and assign and transfer to you without compensation all my interest in the insurance on the buildings on said real estate.

"The deed which I am to make you for said real estate shall set forth that you do assume $2,000.00 of the debt

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secured on said real estate and you are to sign said deed with a clause therein to the effect that you do make such assumption. This debt I certify is the only debt against the property, or, if another, then such other shall be forthwith released.

"You are also to sell to me and give me a bill of sale for the following personal property where the same now is, free of all liens:

"Namely, one H. P. boiler and engine; one High Point sawmill; one cut-off saw frame, etc., and 25 shares of stock in the Virginia Interstate Land Agency, Inc.

"The above mentioned tangible personal property which you are to sell me is all in Campbell county, near Concord, Va.; the boiler and engine being on the C. B. Cross & Bro.'s property, and the other personal property is on the farm of M. D. Haden.

"I make you this offer for the sale or exchange of my real estate and personal property above mentioned for the personal property of yours hereinbefore mentioned on the terms above set out, and in consideration of $1,000 to me in hand paid, receipt of which is hereby acknowledged. I agree that this offer shall be subject to your acceptance or rejection at any time within three days.

"If the said M. D. Haden shall accept the foregoing offer I hereby agree that all the undertakings on my part hereinbefore made will be fully performed within three days from the date hereof.

"Witness my hand and seal.

"W. T. FALLS,
"[Seal]"

"I hereby accept the foregoing offer the 7th day of February, 1912.

"M. D. HADEN,
"[Seal]"

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On the day the offer was made two papers were prepared, of which the following are copies:

"Whereas by a writing of this date Walter K. Falls has made a certain offer to M. D. Haden involving the sale of 42½ acres of land, more or less, to the said Haden, and certain personal property and the transfer by said Haden to the said Falls of twenty-five shares of stock in the Virginia Interstate Land Agency, Incorporated, a copy of which writing is hereto attached. This writing further witnesseth: That if the aforesaid offer made by the said Falls to the said Haden shall be accepted by the said Haden and shall be fully performed by the said Falls, then for value received the undersigned Virginia Interstate Land Agency doth hereby release and relinquish as compromised and satisfied all claims or demands of any kind, whether at law or in equity, and which it has asserted, or which it could or might hereafter assert, either by action at law or suit in equity against him, and the said M. D. Haden on his part, if said agreement shall be accepted by him and faithfully performed by the said Falls, hereby releases all demands of any kind against the Virginia Interstate Land Agency, either at law or in equity, or which he has already asserted, or would or might hereafter assert, by action at law or suit in equity.

"Witness the following signatures and seals, this, the 6th day of February, 1912.

"VIRGINIA INTERSTATE LAND AGENCY,
"By its President."

"This agreement, between Mrs. Evie M. Haden, wife of M. D. Haden, party of the first part, and the Virginia Interstate Land Agency, Incorporated, party of the second part:

"Witnesseth, that whereas certain offers have been made by W. T. Falls to M. D. Haden involving the purchase of the said Haden's stock in the above named corporation,

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and requiring the performance of certain things by the said Falls, in the event M. D. Haden should accept the latter's offer;

"And, whereas, the said Mrs. Evie M. Haden is the holder of a note or bond for $1,000.00 of the aforesaid corporation, secured by deed of trust on a lot with a concrete house thereon, in Westover Heights, West Lynchburg, Campbell county, Virginia, which note, with one year's interest thereon, will become due and payable February 14, 1912;

"Now, therefore, it is hereby agreed between the parties hereto that if the said M. D. Haden shall accept the offer of the said W. T. Falls, and if the said Falls shall faithfully and fully perform his part of the undertakings in his said written offer to the said M. D. Haden, in the event said offer is accepted, and if the said Virginia Interstate Land Agency shall faithfully discharge and release the said M. D. Haden from all and every manner of liability, claim or demand which it, the said company, has, or thinks it may have, against the said M. D. Haden, then the said Evie M. Haden hereby covenants and agrees that if the interest, amounting to $60.00, on said $1,000.00 note or bond shall be promptly paid to her on or before February 14, 1912, she will then extend the time for the payment of said $1,000.00 note to March 1, 1912. Witness the following signatures and seals this February 6, 1912.

"VIRGINIA INTERSTATE LAND AGENCY,

"By ————, Its President.

"EVIE M. HADEN,

"By S. V. Kemp, Her Attorney."

In a few days after the acceptance of the said offer of sale, of which the vendor was promptly notified, perhaps on the 12th of that month, he signed and acknowledged a deed in which he and his wife were named as grantors and

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the appellant as grantee, conveying the real estate mentioned in the said offer of sale, but the deed was never signed by the wife. On the 21st of the month Falls and his wife conveyed the said land to the Virginia Interstate Land Agency. On the 28th of the same month that corporation conveyed the most valuable portion of the land to W. T. Cross and wife.

In March following this suit was instituted against the vendor, Falls, the Virginia Interstate Land Agency, Cross and wife and Whitaker, trustee, in a deed of trust dated February 28, 1912, executed by Cross and wife, for the purpose of having the said conveyance set aside as void on the ground that the grantees, respectively, in said conveyances were purchasers with notice of the appellant's prior agreement to purchase the said land and to specifically execute the said agreement between Haden and Falls. The circuit court refused the relief sought, and dismissed the bill. From that decree this appeal was allowed.

It is insisted here by the appellees, as it was in the circuit court, that the appellant was not entitled to the relief sought because the offer to sell by Falls and its acceptance by the appellant did not constitute the entire contract between them, but that they and the other two papers mentioned above were parts of one transaction, and that it was understood that there could be no trade unless all of the said papers were duly executed, including a release by the Virginia Interstate Land Agency of the liens held by it against the land then owned by Falls and in the bill described; and, as the other papers were not duly executed, Falls was under no obligation to and could not specifically perform his offer to sell.

(2) Because, even if the agreement sued on constituted the entire contract between Falls and the appellant, the latter did not keep and perform it on his part;

(3) Because of Falls' inability to keep and perform the contract on his part;

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(4) Because the agreement between Falls and the appellant had been abandoned before the Virginia Interstate Land Agency purchased the land;

(5) Because Cross and wife were purchasers for value without notice of the agreement sought to be enforced.

A. S. Hester, for the appellant.

H. C. Featherston and *George E. Caskie,* for the appellees.

BUCHANAN, J. (after making the foregoing statement), delivered the opinion of the court.

In considering the case a serious question arises, not raised in the answers, nor discussed at the bar, and that is whether the coverture of Mrs. Falls does not stand in the way of any decree for the specific performance of the agreement against her husband.

The bill does not make the wife a party, but after alleging that her dower interest in the land is of little, if any, practical value, since there exist upon the land two deeds of trust, in which she united with her husband, securing sums aggregating more than the full value of the land, the bill asks, among other things, that the contract between the appellant and Falls and the deed signed by him to the appellant be declared of binding force and effect, "and that specific performance of the contract and said deed and each of them be decreed; and if the same cannot be fully enforced by reason of the wife of said W. T. Falls not having joined or united therein, then that the said contract and deed be enforced with the further provision made for the protection of this complainant against any outstanding dower interest, if such there be, in the wife of said Falls; that the consideration agreed to be paid or delivered

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by your complainant to the said W. T. Falls be under the orders and proceedings of this court, or through some receiver or commissioner appointed by it, sold and the proceeds retained so far as need be for your complainant's protection against said outstanding dower interest, if any, and to the payment of said Falls' obligations in said contract aforesaid to your complaintant; that a personal decree be entered against the said W. T. Falls for any and all liabilities owing by him to your complainant and growing out of the said contract, and that all necessary and proper accounts be ordered and taken," and for general relief.

It is well settled in this State and generally that a wife cannot be compelled to unite with her husband in conveying land under his contract to sell. 1 Minor on Real Property, sec. 318, and cases cited in note 5, and cases cited in note to *Aiple-Hemmelmann* v. *Spelbrink,* 14 Ann. Cas. 652, 671. But the courts are not agreed whether or not such a contract will be specifically enforced when, because of the refusal of the wife to unite in the conveyance, the purchaser demands an abatement of the purchase price or an indemnity by reason of such refusal.

In many jurisdictions, including our own, it seems to be settled that in such a case specific performance will not be decreed. See note to *Aiple-Hemmelmann* v. *Spelbrink, supra,* p. 671, where many cases are collected.

In *McCann* v. *James,* 1 Rob. (40 Va.) 256, no opinion was delivered, but the case made and the question decided is thus stated in the head-note by Mr. Robinson: "A husband sells land in which his wife has an estate in fee, and executes a bond to the purchaser, conditioned that he and his wife will make a deed to the purchaser within a specified time. After that time the husband states that his wife has declinded joining him in the deed, and has forbidden him to convey his estate, and he refuses to make any conveyance. Thereupon a bill is filed by the purchaser against

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the husband, stating that there are children of the marriage, claiming that the husband is therefore entitled to a life estate and praying that he may be decreed to convey to the complainant all his interest in the land, reserving to complainant his right of action at law upon the bond against the husband for failing to procure his wife to unite with him in the conveyance. The bill being demurred to, the circuit court sustains the demurrer and dismisses the bill, and this decree is affirmed."

In the case of *Clark, &c.,* v. *Reins,* 12 Gratt. (53 Va.) 98, it was held that a court of equity will not decree a specific performance of a contract by a husband and wife for the sale of the wife's land at the suit of the vendee, the wife refusing to execute the contract, nor will the court compel the husband to convey his life estate to the vendee with compensation for the failure of the wife to convey her interest in the land. In that case, Judge Daniel, who delivered the opinion of the court, after discussing the cases of *McCann* v. *Jones, supra,* and *Evans and Wife* v. *Kingsbury,* 2 Rand. (23 Va) 126, 14 Am. Dec. 779, and *Watts* v. *Kenny and Wife,* 3 Leigh (30 Va) 272, 23 Am. Dec. 266, said: "The opinion," referring to Judge Tucker's opinion in the last named case, "was approved by the whole court, as was also that of Judge Green in *Evans and Wife* v. *Kingsbury.* Whilst, therefore, I do not find any precedent in our reports of a direct refusal by this court to decree at the suit of the vendee the specific performance of a sale by the husband of the wife's land, yet in the absence of any case or opinion here questioning the propriety of the two last cited decisions, I feel no hesitation in recognizing them as true expositions and ruling adjudications of the law of this case."

The cases of *Evans and wife* v. *Kingsbury* and of *Watts* v. *Kinney and Wife* were each suits by the husband and wife against the vendee for a specific execution of the con-

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tract of the husband against his vendee. In these cases the court found it necessary to consider and decide what ought to have been the holding if the suits had been brought by the vendee, and in each of them the court held that such a decree could not have been properly rendered in favor of the vendee, and refused to decree specific performance in favor of the vendors on the ground of want of mutuality.

In *Graybill, &c.*, v. *Brugh*, 89 Va. 895, 17 S. E. 558, 17 L. R. A. 133, 37 Am. St. Rep. 894, it was held that "specific execution of an agreement," quoting with approval the language of Warville on Vendors and citing *Clark* v. *Reins*, "to sell and convey will not ordinarily be decreed against a vendor, a married man, whose wife refuses to join in the deed, where there is no proof of fraud on his part in her refusal, unless the purchaser is willing to pay the full purchase money and accept the deed without her joining." See Minor on Real Property, sec. 318.

The rule announced in the last named case and the reason therefor, whether the interest of the wife be her contingent right of dower or a greater interest, is clearly stated by Judge Sharswood in *Riesz's Appeal*, 73 Pa. St. 490, 491. After referring to several cases in that jurisdiction on the question, he says: "These cases settle, if any amount of authority can settle anything, that in Pennsylvania specific performance of an agreement to sell real estate will not be decreed against a vendor who is a married man and whose wife refuses to join in the conveyance, so as to bar her dower, unless, indeed, the vendee is willing to pay the full purchase money and accept the deed of the vendor without his wife joining. The policy of these decisions is very manifest. The wife is not to be wrought upon by her love for her husband and sympathy in his situation to do that which her judgment disapproves as contrary to her interest, nor is he to be tempted to use undue means to procure her consent. The vendor must be

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left in such cases to his action at law to recover damages . . . The case does not fall within the principle of those decisions where the vendor, who cannot make title to all he has contracted to convey, is held to be not thereby relieved from specific performance as far as it is in his power, but shall be compelled to execute his contract with a reasonable abatement in the price. The right of dower of the widow is of such a contingent nature, depending, as it does, as well upon her surviving her husband as on her continuance in life after his death, that no abatement in the price can be made which will be just to both parties, without in effect making a new contract for them—a contract which perhaps, in the first instance, neither party would have come into, certainly not the vendor. Receipt of the purchase money in full may have been the main object of the sale to enable him to pay debts or to carry on other plans. If he is to be subjected to serious pecuniary loss by his wife's refusal to join, it will operate almost as powerfully as the peril of imprisonment as a moral coercion and compulsion upon her to yeild her consent, instead of that free will and accord which the law jealously requires her to declare by an acknowledgment upon an examination before a magistrate separate from her husband."

"The policy of the law," as was said by Lord Eldon in *Emory* v. *Ware,* 8 Vesey, Jr. (Eng.) 515, "is that a wife is not to part with her property but by her own spontaneous and free will. If this was perfectly *res integra,* I should hesitate long before I would say the husband is to be understood to have gained her consent, and that the presumption is to be made that he obtained it before the bargain, to avoid all fraud that might afterward have been practiced to procure it. I would have hesitated long in following up that presumption rather than the principle of the policy of the law, for if a man chooses to contract for the estate of a married woman or an estate subject to dow-

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er, he knows the property is hers altogether or to a given extent. The purchaser is bound to regard the policy of the law, and what right has he to complain if she, who, according to law, can part with her property but by her own free will expressed at the time of the act of record, takes advantage of the *locus penitentiae;* and why is he not to take his chance to damage against the husband?" See also *Peeler* v. *Levy,* 26 N. J. Eq. 330, 335; Pom. Spec. Perf. Contr., sec. 461; *Cowan* v. *Kane,* 211, 111, 575, 71 N. E. 1097, 41 Ohio St. 641; *Fortune* v. *Watkins,* 94 N. C. 315; *Aiple-Hemmelmann* v. *Spelbrink, supra.*

There is neither allegation nor proof that Mrs. Falls' refusal to unite in the conveyance signed by her husband was procured by his fraud. It is true in this case, as in the case of *Clark* v. *Reins, supra,* that no objection was made in the answers of any of the defendants to the specific execution of the husband's contract on the score of the coverture of the wife of the vendor, nor was that objection urged in argument here; but as the denial of a court of equity to specifically execute a husband's contract for the sale of land in which his wife has an interest, where she refuses to join in the conveyance, unless the purchaser is willing to pay the full purchase price, claiming neither an abatement thereof nor indemnity on that account, is based upon principles of public policy, the fact that the objection was not made in the answers would not seem to be material.

In *Clark* v. *Reins, supra,* p. 110, in discussing this question it was said: "It is true no objection to a specific performance was made by the defendants in their answers on the score of Mrs. Branch's coverture, and it is urged on behalf of the appellee that this court ought not to proceed on the supposition that she may not be willing to unite in the conveyance. The same feature existed in the case of *Emery* v. *Wane,* yet it was not regarded by the master of the rolls when the case was before him (5 Vesey Rep. 847)

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or by Lord Eldon on the appeal (8 Vesey R. 505) as a circumstance of any moment. In that case, as in this, the defendants all united in one answer, in which they resisted the decree on grounds wholly independent of the coverture of some of the female defendants, yet the court gave the same weight to the objection as if it had been distinctly and formally presented. The appellants all strenuously resisted the decree in the circuit court and are still seeking to reverse it here, and little, if any, chance of benefit to the appellee could be anticipated from sending the case back in order, by privy examination (indeed, if such a practice in any case could be allowed here), to ascertain whether Mrs. Branch will choose to unite in a deed, as there can be little or no doubt as to what her response would be."

Mrs. Falls testified in this case, and while she stated that she would have been willing to have united with her husband in a conveyance made in accordance with the terms and conditions of the agreement between her husband and the appellant as construed and understood by her husband and herself, it is clear from her evidence that she is unwilling to unite with him in a conveyance upon the terms of the agreement as construed and understood by the appellant and as he seeks to enforce it. This being so, and the bill of the appellant showing that he is not willing to pay the full purchase price and accept a deed from his vendor alone, but is asking that a portion thereof be retained by the court for his protection against the outstanding dower of the vendor's wife, the appellant is not entitled to a decree for specific performance, and the trial court did not err in dismissing his bill.

Affirmed.

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Richmond

HAWLING v. CHAPIN AND OTHERS.

January 15, 1914.

1. LIMITATION OF ACTIONS—*Injury to Property—Nuisance—Cesspools.*—The limitation to an action to recover damages for injury to the plaintiff's property by reason of cesspools constructed and maintained by the defendant on his land adjacent to that of the plaintiff is five years, and pleas setting up the statute of limitations of one year and three years, respectively, are bad, and, if objected to, should be rejected.
2. PLEADING—*Insufficient Plea—Objection—Forced to Join Issue—Effect.*—If a plea is insufficient and no answer to the action, it should be rejected when objected to, and the plaintiff should not be put to an issue upon it. A mental reservation of the court to strike it out during the trial, not acted upon, does not cure the error, and the failure to strike it out constitutes good ground for reversal unless, when all the facts are certified, it affirmatively appears that the plaintiff could not have been injured by having been forced to try his case on the improper plea.

Error to a judgment of the Circuit Court of Loudoun county in an action of trespass on the case. Plaintiff assigns error to an inadequate judgment in his favor.

Reversed.

The opinion states the case.

Richard H. Tebbs and *Cecil Connor,* for the plaintiff in error.

Edwin E. Garrett, for the defendant in error.

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HARRISON, J., delivered the opinion of the court.

This action of trespass on the case was brought by Eugene Hawling to recover of the defendants, John D. Chapin and others, damages for alleged injuries to his property which the plaintiff claims to have sustained in consequence of the maintenance by the defendants of several cesspools on their property, which had so polluted the plaintiff's well of water as to render the same wholly unfit for use.

The record shows that the plaintiff was the owner of a house and lot in the village of Bluemont, in Loudoun county, which he occupied with his family as a home, and that upon the premises he had a well which furnished him his water supply until it became so polluted that he was compelled to abandon its use. It further appears that the defendants owned the adjoining lot, upon which was erected large buildings used for hotel purposes, which were occupied by numerous guests, especially in the summertime, as well as by the family of the defendant, Chapin. Upon these premises the defendants had constructed at different times three cesspools, into which was emptied all the sewage of the hotel from the water closets, baths and kitchen. The first cesspool erected by the defendants polluted their own well to such extent that it had to be abandoned, and a second was constructed and used until the summer of 1906, when the earth about it was found to be so saturated with the sewage that a third cesspool was constructed, into which all of the sewage was emptied through pipes. These cesspools were on an elevation above the plaintiff's well, and at a distance of from eighty-five to one hundred feet, with the slope of the ground in the direction of the plaintiff's house, and he alleges that the percolations therefrom destoyed the use of his well for all domestic purposes.

The plaintiff's declaration was filed in November, 1909,

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setting out the acts and trespass of the defendants, and alleging that his premises and property had thereby been greatly damaged and permanently depreciated in value.

The defendants pleaded the general issue, and filed three special pleas, the first relying on the one year statute of limitations, the second on a limitation of three years, and the third on a limitation of five years. The plaintiff moved the court to strike out the pleas of not guilty in one year, and not guilty in three years, insisting that the limitation of five years was alone applicable. The court overruled this motion, and thereupon the plaintiff replied generally to all of the pleas, and issue was joined. The jury was sworn upon the issues thus made upon those several pleas.

In the bills of exception taken to the admission of pleas one and three, the judge certifies that he was of opinion that the pleas were bad, and that he so stated when the objection to them was made, and that the ruling of the court would be to strike them out unless counsel offering them could produce some authority for his contention, but that the jury might be sworn and the ruling of the court made in the course of the trial when the question raised by the pleas should arise. The court further certifies that no further reference was made to the pleas during the course of the trial.

If it was error to admit the pleas, they should have been struck out when the objection to them was made, and this mental reservation of the court to strike them out during the progress of the trial, which was not done, did not affect or cure the error in admitting them. The extent of the record on the subject is that the plaintiff moved to strike out the pleas setting up the one and three year statutes of limitations, and that the court overruled the motion and the plaintiff excepted.

It cannot be successfully disputed that the limitation of five years is alone applicable to this case. Code, sec. 2927;

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Va. Hot Springs Co. v. *McCray,* 106 Va. 461, 56 S. E. 216, 10 L. R. A. (N. S.) 465. It is equally clear that the pleas objected to were no answer to the plaintiff's action, and that they should have been rejected when the motion to strike them out was made.

In *Hopkins* v. *Richardson,* 9 Gratt. (50 Va.) 485, Judge Lee says: "Nor is it any answer to the objection to say that the pleas, even if bad, could do the plaintiffs no harm by being in the record. That is an inquiry upon which the court should scarcely enter, nor should it speculate upon the effects of an improper plea in prejudice of the plaintiff's rights. If it be insufficient and no answer to the action, it should be rejected when objected to, nor should the plaintiff be put to an issue upon it."

In *Banks* v. *Kimberlands,* 16 W. Va. 555, Judge Green cites the Virginia case mentioned, saying the views of Judge Lee were cited approvingly in *Guffie* v. *McCoy,* 8 W. Va. 206, and adds: "In my judgment, the refusal to reject a plea which a court ought to reject is good ground for reversal, unless, when all the facts have been certified by the court, it affirmatively appears to the court that the plaintiff could not be injured by having had to try his case on an improper plea."

Testing the case at bar by the rule as qualified by Judge Green, it does not affirmatively appear that the plaintiff was not prejudiced by the action of the court requiring him to go to trial with the pleas objected to in the record. On the contrary, a careful consideration of the facts disclosed by the record leads to the conclusion that the plaintiff may have been very seriously injured by the presence of the improper pleas. It would be the merest speculation to say that he was not.

The assignment of error involving the admission of certain evidence was abandoned at the bar because not properly perfected. As the case must go back because of the

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error in admitting the pleas under consideration, it is unnecessary to consider the assignment of error relating to the inadquacy of the damage found by the jury.

The judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial in accordance with this opinion.

Reversed.

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Syllabus.

Richmond

LANSTON MONOTYPE MACHINE COMPANY v. TIMES-DISPATCH COMPANY.

January 15, 1914.

1. INJUNCTIONS—*Breach of Negative Covenants—Specific Performance.* Where specific performance is the object of the suit, the general rule is that an injunction will not be granted to restrain a defendant from violating negative covenants when the agreement is of such nature that it cannot be specifically enforced. An injunction restraining the breach of a contract is a negative enforcement of that contract.
2. INJUNCTIONS—*Negative Covenants as to Chattels—Adequate Remedy At Law—Equity.*—If a contract relates to chattels, a court of equity will not enjoin a breach of its negative covenants unless the legal remedy of damages is inadequate. The fact that adequate remedy at law exists for the violation of an agreement is always sufficient to prevent the interference of equity.
3. DAMAGES—*Remoteness—Sale of Chattels—Case in Judgment.*—The contract, in the case in judgment, was for the sale by the complainant to the defendant of certain type-setting machines upon the terms named in the agreement, and not an independant agreement by which the defendant undertook and agreed to operate the machines for the benefit of the defendant, and the object of the stipulations as to installing and operating the machines was merely to insure them a fair trial and to satisfy the defendant of their suitability and efficiency for the purposes for which they were sold. For the breach of such contract the complainant is entitled to recover such damages as might be naturally expected to flow therefrom, but not damages which may result from the substitution of rival machines in the place of those purchased of the complainant.
4. DAMAGES—*Remoteness—Breach of Contract—Collateral Agreements.* Damages cannot be recovered for the breach of any contract unless they be such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation.

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They must be certain both in their nature and in respect to the cause from which they proceed, and they must be proximate and certain, or capable of being made certain, and not remote, speculative or contingent. If they were only such as would have been realized from other independant and collateral undertakings, although entered into in consequence and on the faith of the original contract, they are too uncertain and remote to be taken into consideration as a part of the damages by breach of the contract in suit.

Appeal from a decree of the Law and Equity Court of the city of Richmond. Decree for the defendant. Complainant appeals.

Affirmed.

The object of the bill in this case, which was filed by the Lanston Monotype Machine Company, a manufacturer of machines for casting and composing type called "monotypes," was to enjoin and restrain the Times-Dispatch Company, which publishes in the city of Richmond a newspaper called *The Times-Dispatch,* from removing certain monotype machines, made by the complainant, from the building of the defendant, and to prevent the latter from installing in its building more than two composing or type-setting machines other than "monotypes," and to compel the defendant newspaper company to operate the said "monotypes," which had been installed in its building under a contract with the complainant company.

The agreement between the parties, which was made in November, in the year 1912, sets out the reasons of the parties for entering into it as follows:

"Whereas, for several years past the Times-Dispatch has in the production of its paper made use of certain machines known as linotype machines; and whereas, the Monotype Company believes that the machines made by it, which are hereinafter referred to as monotype machines, are superior to the linotype machines for newspaper purposes,

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and wishes the Times-Dispatch to cease using linotype machines and install monotype machines for the production of its newspaper; and

"Whereas, the Times-Dispatch is unwilling to install monotype machines in place of the linotype machines now used by it, unless it has definite and satisfactory assurances by the Monotype Company that its production of type will not suffer either in economy or efficiency by reason of the installation and operation of monotype machines; or that, if the Times-Dispatch does so suffer, the Monotype Company will indemnify, secure, and protect it from all loss so incurred; and

"Whereas, the Monotype Company is willing to enter into an agreement protecting the Times-Dispatch from all loss which may be suffered by it as a result of the installation of monotype machines.

"Now, therefore, this agreement witnesseth:"

The contract then sets out the undertakings of the complainant company, among which are the following:

"(A) That the Monotype Company agrees to install in the building of the Times-Dispatch, on south Tenth Street, in the city of Richmond, Virginia, twelve (12) monotype machines with necessary motors, molds and matrices for composing the news matter, heads and advertisements, except such of this matter as is now set by hand by the Times-Dispatch.

"(B) That the Monotype Company guarantees that this equipment will produce, with hand-set advertisements, at least nine-hundred and ten (910) columns per week; this matter to be produced in accordance with the requirements of the Times-Dispatch for its daily, Sunday and weekly issues just as similar matter is now produced for these papers.

"(C) That the Monotype Company will install without cost to the Times-Dispatch as many more monotype ma-

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chines as may be necessary to give this guaranteed production, if the twelve machines specified above fail to do this."

By clauses "D" and "E" the complainant guarantees that the cost per column of type produced shall not exceed a certain sum, and provides how such cost is to be determined, etc. By other clauses it is provided, (clause "G") that the complainant shall not interfere with the management of the composition room or other department of the defendant; (clause "H") that it will use all reasonable efforts to supply the defendant with motors, machinists and other employees necessary to operate the monotypes when called upon to do so; (clause "I") that it will carefully inspect the "monotypes" every three months if desired; (clause "K") that it will pay the wages of the defendant's employees while learning to operate the monotypes before they are used in the production of the paper, and in order to give such instruction prior to the installation of the "monotypes," will establish a school and pay all the expenses thereof.

The defendant, "The Times-Dispatch, hereby covenants and binds itself to install and operate the monotype machines covered by this agreement and to pay the Monotype Company therefor the sum of fifteen thousand dollars ($15,000) on or before the first day of January, 1918. This amount to be paid in instalments of not less than fifteen hundred dollars ($1,500) a year. These payments to be made on the first day of July 1913, 1914, 1915, 1916, and 1917, and the balance to be paid on or before January 1, 1918. The Times-Dispatch further agrees to pay six *per cent.* (6%) interest from January 1, 1914, to date of payment of the several instalments specified above.

"(O) That the Times-Dispatch will use all reasonable effort to carry out the recommendations of the Monotype Company to the end that these monotype machines may be operated at the highest efficiency.

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"(P) That the Times-Dispatch will not install more than two composing machines, or type-casting machines, other than monotypes, and that if such other machines are installed the cost of their maintenance, repair and operation shall be kept separate and distinct from the cost of these monotype machines, and that the Monotype Company shall not be required to protect the Times-Dispatch from any loss to which it may be subjected by reason of the use of machines other than monotypes.

"(Q) That the Times-Dispatch will repair and replace any damage by fire or other accidents to the monotype machines and equipment furnished under this agreement.

"This agreement shall remain in full force and effect until January 1, 1918, provided that the controlling interest of the Times-Dispatch remains in the present owners thereof, or any of them, or any of their wives or lineal descendants. If at any time subsequent to the date of this agreement, and prior to January 1, 1918, the control of the Times-Dispatch shall pass into the hands of persons other than those hereinabove mentioned, then the Monotype Company may at its option terminate this agreement on a written notice of thirty (30) days to the Times-Dispatch; and in the event of such termination by the Monotype Company, any balance not then paid on the machines shall immediately become due and payable by the Times-Dispatch.

"The Times-Dispatch reserves the right to terminate this agreement any time after January 1, 1914, upon thirty (30) days' notice in writing to the Monotype Company, provided all payments due the Monotype Company before the date of this notice of termination shall have been made. These payments are to be retained by the Monotype Company as compensation for use of the machines and equipment furnished under this agreement."

It is alleged in the bill that the complainant manufac-

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tures and sells monotypes of the kind described in the contract; that in the year 1909 it had installed a battery of monotypes for the *News-Leader,* a newspaper published in the city of Richmond, which were satisfactory and subsequently purchased by the News-Leader Company, which is owned and controlled by the same interests as the Times-Dispatch Company, both being corporations; that there has been for a number of years bitter rivalry between the company manufacturing the linotype machines and the manufacturers of monotypes, and that all manufacturers of the latter had been driven out of the market except the complainant; that the complainant felt that under the circumstances it would be worth thousands of dollars if it could enter into a contract with the Times-Dispatch to use its monotypes in place of the linotypes, which it had been and was using at the time the said contract was entered into; that it knew that there was opposition by certain officers and employees of The Times-Dispatch Company to the use of monotypes; that it knew that in order to get the best results from the use of its machines, if its machines were installed in the Times-Dispatch building, it must have the earnest co-operation of that company; that for these reasons it was willing to make an agreement upon much more favorable terms than sound business policy would have otherwise dictated; that it did make the said agreement, and, pursuant thereto, installed its twelve monotype machines, with their necessary equipment, in the defendant's building, and had complied with all the terms and provisions of the said contract; that while there was some difficulty experienced in the use of the monotypes, as is almost invariably the case with the operation of new machinery, there would have been no delay in the production of the paper if the defendant's agents and employees had given their promised co-operation in the use of the monotypes; that after various efforts on the part of the com-

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plainant to get the defendant's agents and employees to use or operate the monotypes as the complainant insisted should be done, and was entitled under its agreement to have done, the defendant, during the same month in which the monotypes had been installed in its building, to-wit, on the 28th day thereof, notified the complainant of its intention to cease the use of the monotypes and to install and have in use and operation other type-setting machines in its building by the first day of the February following; that "if the monotype machines of your complainant are removed from the Times-Dispatch office and linotype machines substituted in their place it will damage this complainant many thousands of dollars in excess of the amount agreed to be paid for the machines installed, and prevent their introduction into innumerable other printing establishments, and greatly retard the steady progress which your complainant has made in supplanting the linotype machines. Indeed, it is impossible to estimate or calculate the damage and loss which would result therefrom, and for which your complainant could not be compensated in damage in an action at law."

On the first day of February, in accordance with the prayer of the bill, the court granted an injunction, but provided in its order that it should expire on the 15th of that month unless extended or enlarged by the court. By subsequent orders the injunction was amended and kept in force until the 20th of March following, when it was dissolved. On the 20th of the next month a demurrer to the bill was sustained and the bill dismissed. From that decree and certain other decrees entered in the cause, this appeal was granted upon the petition of the complainant.

There are provisions in the agreement and allegations in the bill other than those mentioned above, but they do not seem to be material to a consideration of this appeal in the view the court takes of the case.

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Munford, Hunton, Williams & Anderson and *Thomas B. Gay*, for the appellant.

McGuire, Riely & Bryan and *Braxton & Eggleston*, for the appellee.

BUCHANAN, J. (after making the foregoing statement), delivered the opinion of the court.

One of the errors assigned, and the only one that it is necessary to consider, in the view the court takes of the case, is that the trial court erred in sustaining the demurrer to the bill and dismissing the same.

It is conceded, and if it were not it is clear, that the agreement between the parties is of such a nature that it is not susceptible of specific enforcement by the court. But it is insisted that, although the court was unable to specifically execute the contract, yet the case made by the bill entitled the complainant to an injunction restraining the defendant from violating the covenant contained in clause "P" of the agreement, by which it bound itself not to install in its printing establishment more than two composing or type-setting machines other than monotypes.

The general rule is that an injunction will not be granted to restrain a defendant from violating negative covenants when the agreement is of such a nature that it cannot be specifically enforced where specific performance is the object of the suit. 2 High on Injunctions (4th ed.), secs. 1109, 1162; 4 Pom. Eq. Jur. (3d. ed.), sec. 1341; 3 Elliott on Contracts, sec. 2345; 22 Cyc. 850-1.

Where the object of the suit is not to enforce specific performance of the agreement, which contains both affirmative and negative covenants, there are cases which hold that a court of equity may interfere by injunction to prevent the breach of a negative covenant, although the af-

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firmative stipulations are of such a nature that they could not be specifically enforced; but, as said by High on Injunctions, section 1164, the cases upon this question are exceedingly conflicting and irreconcilable. While the authorities are conflicting as to whether or not such relief can be granted and under what circumstances it may be done, all the authorities seem to concur in the view that in no case will such an injunction be granted unless it appears that the complainant has no adequate remedy at law.

Pomeroy, in his work on Equity Jurisprudence, vol. 4, section 1341, says that "an injunction restraining the breach of a contract is a negative enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel specific performance." *Grubb* v. *Moore,* 108 Va. 83, 60 S. E. 757.

Where the contract which is sought to be specifically decreed, or a breach of its negative covenants enjoined, relates to chattels, the universal test of the jurisdiction of a court of equity to grant such relief, both in England and in this country, is the inadequacy of the legal remedy of damages. 4 Pom. Eq. Jur., sec. 1341; 5 Do., sec. 299.

"The fact that ample remedy exists at law for the violation of an agreement," says High on Injunctions, sec. 1107, "is always sufficient objection to the interference of equity." 3 Elliott on Contracts, sec. 2279.

Unless, therefore, the facts alleged in the bill show that the remedy at law is inadequate, the demurrer was properly sustained and the bill dismissed. *Hudson* v. *Kleve,* 9 Gratt. (50 Va.) 379, 384-6; *Morrison* v. *Spear,* 10 Gratt. (51 Va.) 229, 230; *Ely, &c.,* v. *Johnson,* 114 Va. 31, 75 S. E. 748.

It appears from the bill and the agreement of the parties filed therewith as an exhibit that the complainant desired very much to make sale of its monotype machines to the

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defendant and to have the latter operate them, and thereby to supplant the use of the linotype machines, and that if this result could be accomplished, the complainant expected that its business would be materially enhanced from having its machines used by the defendant, a leading and influential newspaper. It further appears from the complainant's pleading that the officers and some of the managing employees of the defendant were not satisfied that the complainant's monotypes were the best machines for the purpose of the defendant. The obligations of the defendant, under the agreement, were to install and operate the monotype machines of the complainant with a view of ultimately becoming the absolute owner of them at the price of $15,000, payable by installments becoming due, respectively, in the years 1913, to and including the year 1918, subject to the right of the defendant to cease their use and return them after notice at any time after January 1, 1914. The payment or payments made or installments due under the contract, up to the time the right to return, if the machines were returned, was exercised, were to be retained by the complainant as compensation for the use of its machines and equipment furnished under the contract. The defendant further bound itself to use reasonable efforts to operate the monotype efficiently and not to install more than two machines in its newspaper building other than monotypes.

While there are various stipulations in the agreement as to what the complainant was to perform and might be called upon to perform, the contract, as we understand and construe it, was for the sale of the complainant's machines upon the terms named therein, and not an independent agreement by which the defendant undertook and agreed to operate the machines for the benefit of the complainant. The operation of the machines provided for in the contract was not for the purpose of showing to the public or to

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those using type-setting machines generally that the complainant's machines were efficient in newspaper publishing, and thereby to increase the reputation and market value of the machines, but the object or purpose of operating the machines in the manner provided for in the agreement was merely to satisfy the defendant, its officers and employees, of the suitableness and efficiency of the machines for the purposes for which they were sold. In other words, as said by the trial court, taking the various stipulations on both sides in connection with the right to terminate after the end of the first year, it seems clear that the obligation of the parties to install and operate was only for the purpose, on the part of the complainant, to have the defendant give the machines a fair trial, and, on the part of the Times-Dispatch people, to satisfy themselves that the machines would produce type efficiently and economically for them.

If this be the correct construction of the agreement between the parties, it is clear that there could be no recovery at law or in equity for such injury to its business as the bill alleges would result, viz.: "If the monotype machines of your complainant are removed from the Times-Dispatch office and linotype machines substituted in their place, it will damage this complainant many thousands of dollars in excess of the amount agreed to be paid for the machines installed, and prevent their introduction into innumerable other printing establishments and greatly retard the steady progress which your complainant has made in supplanting the linotype machines. Indeed, it is impossible to estimate or calculate the damage and loss which would result therefrom, and for which your complainant could not be compensated in damage in an action at law."

Injuries frequently result in one way or another to the business of one party to a contract by its breach on the part of the other party, but damages cannot be recovered

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for the breach of any contract unless they be such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract—that is, such as might naturally be expected to follow its violation; they must be certain both in their nature and in respect to the cause from which they proceed, and they must be proximate and certain, or capable of being made certain, and not remote, speculative or contingent. *Perry Tie and Lumber Co.* v. *Reynolds,* 100 Va. 264, 269-70, 40 S. E. 919; *Western Union Tel. Co.* v. *Hall,* 125 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479, 483; 3 Elliott on Contracts, sec. 2131.

The damages, as was said in *Fox* v. *Harding,* 7 Cush. 516, and quoted with approval in *Western Union Tel. Co.* v. *Hall, supra,* "must be part and parcel of the contract itself, and must have been in contemplation of the parties when the agreement was entered into. But if they are such as would have been realized from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages by breach of the contract in suit." 3 Elliott on Contr., sec. 2133.

Tested by these well settled rules, it is clear that the complainant was not entitled to recover damages for injury to its business by reason of the defendant's breach. There is no allegation of fact in the bill which shows that the complainant did not have an adequate remedy at law to recover any and all damages to which it would be entitled resulting from breach of the agreement on the part of the defendant. This being so, the demurrer to the bill was properly sustained and the bill dismissed by the trial court.

Affirmed.

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Richmond

LEMONS v. HARRIS AND OTHERS.

January 15, 1914.

1. APPEAL AND ERROR—*Verdict Contrary to Evidence—Evidence Not Certified.*—In the absence of the evidence, this court cannot reverse the ruling of the trial court setting aside a verdict as contrary to the law and the evidence. Although it appears from the record that the sole ground relied on by the defendants for setting aside the verdict was that the court permitted counsel for the plaintiff to refer to a section of the Code which had no possible bearing on the case; yet, where it does not appear what reasons may have controlled the court's action this assignment of error cannot be passed upon when the evidence in the case is not certified.
2. MARRIAGE—*Slaves—Issue Legitimated—Proof of Agreement to Live Together.*—Slaves cannot contract, hence their marriages are void. By an act of February 27, 1866, the issue of colored persons who had cohabited together as man and wife, and were then so cohabiting were legitimated whether the rites of marriage had been celebrated between them or not. Under this statute, it is not necessary to prove an agreement *in terms*, that the parties will take one another as husband and wife, but the fact of the relation existing may be established by the acts, conduct and conversation of the parties.
3. SPECIAL JURY—*Discretion.*—The granting or refusing to grant a special jury is a matter resting in the sound discretion of the trial court whose action will not be disturbed where it does not appear that the discretion was abused or the parties prejudiced thereby.
4. COSTS—*Cost of Former Trial—Payment Before New Trial.*—If the costs of the former trial are paid before the new trial is had, that satisfies the requirement of the statute.
5. EVIDENCE—*Pedigree—Whose Declarations Receivable—Death of Declarant.*—Pedigree declarations constitute an exception to the hearsay rule, and only those connected with the family by blood or marriage are competent declarants, and the declarations of even these are inadmissible during the lifetime of the declarant. If living, the declarant is subject to examination as any other witness.

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Error to a judgment of the Circuit Court of York county in an action of ejectment. Judgment for the defendants. Plaintiffs assign error.

Reversed.

The opinion states the case.

Jones & Woodward and *Sidney Smith,* for the plaintiff in error.

J. Thos. Newsome and *Conway S. Shields,* for the defendants in error.

WHITTLE, J., delivered the opinion of the court.

Harriet Lemons brought this action of ejectment against A. A. Harris and John Randall to recover the land described in the declaration. She claims title to the property as the legitimate child and sole heir at law of Henry Diggs, deceased, the former owner. The defendants, on the other hand, claim through deeds from a brother and sister of the decedent, who also maintain that they are his real heirs.

Henry Diggs, the putative father of the plaintiff, and Margaret, her mother, were negroes and slaves, and she was born in Virginia during the civil war. The case was twice tried. At the first trial there was a verdict for the plaintiff, which the court set aside. The second verdict was for the defendants, and upon that verdict the judgment under review was rendered.

The action of the court in setting aside the verdict at the first trial is assigned as error, and we are now asked (in accordance with the statute, Acts 1891-2, p. 692) to enter judgment on the first verdict. There is no certificate of the evidence upon which that verdict was founded, and the motion is rested on the agreed statement that "the

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defendants moved the court to set aside the verdict on the ground that it was contrary to the law and the evidence, and that the sole ground relied upon by the defendants was that the court allowed counsel for the plaintiff in the argument of the case to refer to section 2554 of the Code, which is in the following words: 'The issue of a marriage deemed null in law, or dissolved by the court, shall nevertheless be legitimate'; and that one of the witnesses for the plaintiff . . . testified that she was present when the ceremony of marriage was performed between the reputed father of the plaintiff and her mother during the civil war. . . . To which action of the court, in setting aside the verdict of the jury, the paintiff . . . excepted."

Manifestly this court cannot reverse the ruling of the circuit court in setting aside the first verdict in the absence of the evidence. It may be that the sole ground relied on by the defendants was that the court permitted counsel to refer to section 2554, but it does not appear what reasons may have controlled the court's action, and without having the evidence before us we cannot pass upon that assignment.

We may remark, however, in passing that counsel ought not to have been permitted to refer to section 2554. It had no possible bearing on the case, and such reference was calculated to mislead the jury.

Professor John B. Minor, in his admirable historical discussion of slavery in Virginia, observes: "Previous to February 27, 1866, the marriage laws of Virginia did not contemplate nor include negroes, not even *free negroes,* at least in respect to any penalties for disregard of the laws touching license or prohibition of bigamy, of incestuous marriages, or lewd cohabitation; and hence marriages of free negroes (those of slaves being void) were governed altogether by the common law." 1 Minor's Inst. (4th ed.), p. 268. The author, at page 188, says: "It is agreed that

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slaves have no power to make contracts. Hence the marriages of slaves are void."

Again, at page 268, attention is called to the act of February 27, 1866, as follows: "By the act of February 27, 1866, all distinction between white persons and negroes as to the mode of contracting marriage is obliterated, although, as we have seen, it is still penal for a white person and a negro to intermarry. And it is provided, in order to meet the case of the colored population, especially of that part which had been slaves, that where colored persons (which phrase includes free colored persons as well as slaves) have cohabited as husband and wife, and were then so cohabiting (27th February, 1866), whether the rites of marriage had been celebrated between them or not, they should be deemed husband and wife, and their children, whether born before the act or after, should be legitimate. And that if they had then ceased to cohabit, the children of the marriage recognized by the man should be deemed legitimate. V. C. 1875, ch. 103, sec. 4; V. C. 1887, ch. 100, sec. 2227; *Francis* v. *Francis,* 31 Gratt. (72 Va.) 286-7; *Smith* v. *Perry,* 80 Va. 563.

"It is not necessary under this statute to prove an agreement *in terms* that the parties will take one another as husband and wife, but the fact of the relations existing may be established by the acts, conduct and conversation of the parties." *Francis* v. *Francis,* 31 Gratt. 287.

The two assignments of error with respect to the refusal of the court to grant the prayer for a special jury and to set aside the order awarding a new trial because when the motion was made the defendants had not paid the costs of the previous trial, are both without merit. The granting or refusing to grant a special jury is a matter resting in the sound discretion of the court, and it does not appear either that the discretion was abused in this instance or that the plaintiff was prejudiced by the refusal. The costs

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of the former trial were paid before the new trial was had, and that, in the circumstances, satisfied the requirement of the statute.

The controlling question was whether or not the parents of the plaintiff came within the provisions of the act of February 27, 1866, and it was, therefore, not only proper, but essential, for the circuit court to instruct the jury upon that phase of the case.

The remaining assignment of error which demands our notice involves the admission by the court, over the objection of the plaintiff, of the evidence of a witness touching certain unsworn statements alleged to have been made by other persons concerning plaintiff's paternity. Those statements were inadmissible on two grounds: (1) Because one of the declarants was not a member of the family or so connected with it by affinity as to be competent to speak on the question of pedigree, and (2) because neither declarant was shown to be dead.

Pedigree declarations constitute an exception to the hearsay rule, and only those connected with the family by blood or marriage are competent declarants. And evidence of such declaration during the lifetime of the declarant, of course, is inadmissible. If living, the declarant would be subject to examination as any other witness. This subject is satisfactorily treated in Modern Law of Evidence (Chamberlayne), vol. 4, ch. 43, p. 4037 *et seq.*

For these reasons the judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

Reversed.

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Syllabus.

Richmond

PHILIP LEVY AND OTHERS v. DAVIS.

January 15, 1914.

1. CONTRACTS—*Enforcement—Illegal Consideration—Parties in Pari Delicto.*—Courts will not aid a party to enforce an agreement made in furtherance of objects forbidden by statute, the common law, or the general policy of the law, or to recover damages for its breach, or to recover back money paid under it when the agreement has been executed in whole or in part. If the parties are in *pari delicto* and one of them has performed the illegal agreement in whole or in part, he cannot recover from the other party that which he has parted with under the contract. The law simply leaves the litigants in the plight in which they have seen fit to place themselves without undertaking to balance benefits or burdens. If either derives a benefit from the transaction, it results from the act of the parties and not of the law. In its essence the doctrine is not founded upon the interest or supposed contractual rights of the parties. All such considerations are subordinated to the common weal, and in the eye of the law the contract confers no rights upon the parties. If property of the plaintiff is in the possession of the defendant and he is forced to rely upon the illegal contract in order to recover it, the law will extend him no aid.
2. CONTRACTS—*Illegal Consideration—When Admissible as a Defense.*—Although a plaintiff can make out his case without disclosing the illegal character of the contract in suit, the defendant will be permitted to set up such illegality as a defense whenever the court can see that to permit him to do so will defeat the object of the illegal transaction and promote the interest of society and the policy of the law. This is permitted for the public good and not out of any consideration for the defendant.
3. CONTRACTS—*Illegal Consideration—Mutuality of Interest.*—When the evidence shows mutuality of interest on the part of buyer and seller with respect to the illegal use to be made of the property, there can be no recovery by the seller of either the property itself or the purchase price thereof.
4. APPEAL AND ERROR—*Instructions—Invited Error—Estoppel.*—A party

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who invites error will not be heard to complain of having misled the court. This principle is not affected by the fact that the party had asked for other instructions propounding a different doctrine which were refused and the ruling excepted to. He should have stood by his exception.

5. STATUTES—*Construction—New Remedy—Cumulative Remedy.*—A statute prescribing a new remedy for an existing right should never be construed to abolish a pre-existing remedy, in the absence of express words or necessary implications.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of detinue. Judgment for the defendant. Plaintiffs assign error.

Affirmed.

The opinion states the case.

N. T. Green and *Moe Levy,* for the plaintiffs in error.

O. L. Shackelford and *Williams, Tunstall & Thom,* for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This is an action of detinue to recover the possession of certain furniture and other household goods sold and delivered by the plaintiffs in error to the defendant in error, or if a recovery in specie should prove impracticable, to recover, in the alternative, the fair value of the property, together, in either case, with damages for the detention.

The written contract of sale contains stipulations that "the said parties of the first part do not part with, nor does said party of the second part acquire, any title to said articles until they are fully paid for;" and "the said party of the second part agrees not to remove the said articles from the said premises or sell, or attempt to sell, or otherwise dispose of the said articles without the consent of the said parties of the first part."

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The case was tried on a plea of the general issue, and resulted in a verdict and judgment for the defendant. There is no conflict in the evidence. The goods were bought by the defendant, who kept a house of prostitution in the city of Norfolk, on the suggestion and at the solicitation of Harry Levy, one of the partners, for the specific purpose of being used in her business, and with knowledge on his part of the character of the business and that her only means of payment was the income to be derived therefrom. It furthermore appears that the partner referred to instigated the defendant to enlarge her business and profits by keeping a house full of girls, especially to meet the demands of sailors of the battleship fleet, which was expected at Norfolk on its return from abroad.

The prevailing doctrine with respect to transactions of this class is well stated in 2 Elliott on Contracts, sec. 1064: "As a general rule the law will leave all equally guilty of an illegal or immoral transaction where it finds them, and will neither lend its aid to enforce the contract while executory, nor to rescind it and recover the consideration parted with when executed. 'It is a well settled principle of law that the courts will not aid a party to enforce an agreement made in furtherance of objects forbidden by the statute, or by common law, or general policy of law, or to recover damages for its breach, or when the agreement has been executed in whole or in part by payment of money to recover it back.' "

Again, in section 1094, it is said: "It is also true as a general rule that if the parties are *in pari delicto* and equally at fault and one of them has performed the illegal agreement in whole or in part, he cannot recover from the other party that which he has parted with under the contract. The law will leave the parties where it finds them. The rule is the same in equity."

In this instance we are dealing with a contract in aid

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of a business which the statute denounces as a crime punishable by fine and imprisonment. Va. Code, sec. 3790. And from an ethical standpoint there is no difference in degree of turpitude between the parties, as each knowingly was to participate in the fruits of the crime.

We do not understand the general statement of the law, as laid down by Elliott, to be controverted—at all events it is sustained by the overwhelming weight of authority both English and American. The effort here is made, however, to bring the case within the influence of alleged qualifications of the rule: (1) That such defense will not be suffered to invest a party with greater property rights in the subject-matter than are conferred by the illegal contract; and (2) that if the plaintiffs can make out their case without disclosing the illegal character of the contract, the defendant will not be permitted to set up such illegality as a defense, and there may still be a recovery.

1. The result of the application of the first proposition would practically be to abrogate the rule which avoids such contracts. In its essence the doctrine is not founded upon the interests or supposed contractual rights of the parties. All such considerations are subordinated to the common weal, and in the eye of the law the contract confers no rights upon the parties. If either derives advantage from the transaction, it results from the act of the parties and not of the law. The law simply leaves the litigants in the plight in which they have seen fit to place themselves without undertaking to balance benefits or burdens.

In denying a recovery in the instant case, it was not necessary for the court to consider the quantity of interest in the goods intended to be conferred by the contract upon the buyer. It was sufficient for the court to know that possession of the property had been delivered by the plaintiffs to the defendant, and that in order to recover it the sellers were forced to rely upon a contract condemned by the law as opposed to the moral welfare of society.

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2. The second contention, that plaintiffs were entitled to recover because they could make out their case without disclosing the illegal character of their contract, in the circumstances of the particular case, is not sustained by the decisions of this court.

In *Cardwell* v. *Kelly,* 95 Va. 570, 28 S. E. 953, 40 L. R. A. 240, Riely, J., had occasion to consider the defense of illegal consideration, and the maxims *"nemo allegans"* and *"in pari delicto."* In that case, in an action by the receiver of an insolvent corporation against a stockholder to recover a stock subscription for the benefit of creditors whose debts were contracted on the faith of his and other subscriptions, it was held the stockholder could not defend on the ground that he was induced to subscribe by the chance of obtaining one or more lots in a drawing for distribution of lots of unequal value. *Held,* the subscriber was estopped from setting up a defense involving his own unlawful conduct as against creditors whom he had contributed to mislead. But the learned judge remarks: "It is a general rule, as stated by an able writer, that a contract or an agreement cannot be made subject of an action if it can be impeached on the ground of dishonesty, or as being opposed to public policy—if it be either *contra bonos mores,* or forbidden by the law. Broom Leg. Max. 706. A defendant against whom it is sought to enforce such a contract may show its illegality, and a court of justice will decline to lend its aid to enforce a contract thus wrongfully entered into. When, however, the parties are *in pari delicto,* but the plaintiff can make out his case without disclosing the unlawful nature of the contract, it is not a universal rule that the defendant will be allowed to show its illegality for the purpose of defeating the action." Continuing the discussion, Judge Riely deduces the following governing principle from the authorities with respect to such contracts: "They are injurious to the com-

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munity and violative of the policy of the law; and so the courts, having in view the good of the public, and the policy of the law, will not lend their aid to enforce such a contract unless they can see that to do so will defeat the object of the illegal transaction, and promote the interests of society and the policy of the law. But when, in the particular case, it appears that this will be the result of such contract, the maxim, *'nemo allegans turpitudinem suam audiendus'* is rigorously applied, and the defendant will not be allowed to plead and prove his own wrong."

The doctrine announced in this case is in harmony with the previous decisions of this court on the subject.

In *Camp* v. *Bruce,* 96 Va. 521, 524, 31 S. E. 901, 43 L. R. A. 146, 70 Am. St. Rep. 873, it is said: "The law refuses to enforce illegal contracts, as a rule, not out of regard for the party objecting, nor for any wish to protect his interests, but from reasons of public policy. Whenever, therefore, the illegality of the contract appears, whether alleged in the pleadings or made known for the first time in the evidence, it is fatal to the case. That defect cannot be gotten rid of either by failure to plead it, or by agreement to waive it in the most solemn manner. The law will not enforce contracts founded in its violation." *Roller* v. *Murray,* 112 Va. 780, 72 S. E. 665, 38 L. R. A. (N. S.) 1202; *Southern Ry. Co.* v. *Rice's Admr.,* 78 S. E. 592.

There is also another view of this case equally fatal to plaintiff's pretensions. The trial court at their instance instructed the jury as follows: "The court instructs the jury as matter of law that the mere fact that the plaintiffs knew or had knowledge at the time of the contract of sale between the plaintiffs and defendant that the property embraced in said contract of sale was to be used by the defendant for an illegal or immoral purpose, or purposes, constitutes no defense to the plaintiffs' cause of action herein asserted. In order to prevent a recovery by plain-

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tiffs herein it must further appear from the evidence, and the defendant has the burden of showing by the evidence, that in addition to such knowledge on the part of the plaintiffs, it was a part of the contract of sale between the plaintiffs and the defendant that the property contracted to be sold should be so used."

We entertain no doubt of the soundness of the proposition that when the evidence shows mutuality of interest on the part of the seller and buyer with respect to the illegal use to be made of the property, there can be no recovery. Yet, even if the instruction were erroneous, the plaintiffs would be estopped to question it. A party who invites error will not be heard to complain of having misled the court. Burks' Pl. & Pr. 511; *Kimball & Fink* v. *Friend*, 95 Va. 125, 27 S. E. 901; *Richmond Traction Co.* v. *Hildebrand*, 99 Va. 48, 52, 34 S. E. 888; *Norfolk & Western Ry. Co.* v. *Mann*, 99 Va. 180, 37 S. E. 849; *Richmond Traction Co.* v. *Clarke*, 101 Va. 382, 392, 43 S. E. 618; *Bugg* v. *Seay*, 107 Va. 648, 652, 60 S. E. 89, 122 Am. St. Rep. 877. Nor is this principle affected by the circumstance that the plaintiffs had asked for other instructions propounding a different doctrine which was refused and the ruling excepted to. They should have stood by their exception.

Applying the evidence to the law as laid down in plaintiffs' instruction, there is no escape from the conclusion that the plaintiffs, or one of them, instigated the defendant to buy the property for the avowed purpose of using it in a house of prostitution, and advised the defendant to enlarge the profits of the business by increasing the number of wretched victims of their avarice and doom them to a life of infamy.

Counsel for the defendant have drawn our attention to the remedy provided by section 2462, subdivision 2, of the Code, as furnishing an exclusive remedy in all cases where property has been sold and title reserved in the

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seller. The remedy given by statute is extremely valuable (*Liquid Carbonic Co.* v. *Whitehead, ante.* p. 80, S. E. 104), but there is nothing in the enactment, express or implied, to indicate a purpose on the part of the legislature to abolish pre-existing remedies in that class of cases; and the rule on the subject has long been well settled, that "When a statute gives a new remedy, and contains no negative, express or implied, of the old remedy, the new one provided by it is cumulative, and the party may elect between the two." 2 Words & Phrases 1785; *Booker's Ex'or.* v. *McRoberts,* 1 Call. (5 Va.) 243; *Durrett* v. *Davis,* 24 Gratt. (65 Va.) 302; *Filler* v. *Tyler,* 91 Va. 458, 22 S. E. 235; *Kelly* v. *Lehigh, &c., Co.,* 98 Va. 405, 36 S. E. 511, 81 Am. St. Rep. 736; Barton's Chy. Pr. (2nd ed.) sec. 16; Sedgwick, Construction of Stat. and Const. Law, 75, 342; Sutherlin on Stat. Constr., sec. 399.

A statute prescribing a new remedy for an existing right should never be construed to abolish a pre-existing remedy in the absence of express words or necessary implication.

The discussion of governing principles in the case sufficiently disposes of the subordinate questions involved which have not been specially noticed.

The judgment of the law and chancery court is plainly right and is affirmed.

Affirmed.

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Richmond

McMENAMIN v. SOUTHERN RAILWAY COMPANY.

January 15, 1914.

1. DEMURRER TO EVIDENCE—*Statement of Grounds—Object—Particularity Required.*—The object of the statute (Acts 1912, p. 75) in requiring the grounds of a demurrer to the evidence to be stated in writing was at least two-fold: First, to require the demurrant to give notice in writing of the grounds or causes of demurrer which he intended to rely on, and, second, to prevent him from assigning grounds of demurrer in the appellate court wholly different from those relied on in the trial court. The degree of particularity required must depend to some extent upon the character of the case. Where the language used is broad enough to embrace and comprehend any one of several causes of demurrer, but fails to specify any one of them as the particular ground or cause relied on with reasonable certainty, considering the facts and circumstances of the case, it is not a sufficient compliance with the statute.
2. DEMURRER TO EVIDENCE—*Grounds—General Statement—Case at Bar.* Where the ownership by the defendant of the instrumentalities which inflicted the injury complained of was proved by him on the former trial of the case, and in the instant case was admitted by his counsel in his opening statement to the jury, and in the examination and cross-examination of witnesses both parties have proceeded upon the theory that the defendant was such owner, if the defendant intends in his demurrer to the evidence to rely upon the fact that such ownership has not been proved, it is incumbent upon him to plainly state that ground of demurrer in his written statement of grounds of demurrer, or at least to specify it with reasonable certainty, else it cannot be considered. A general specification broad enough to cover that and several other grounds of demurrer is not a compliance with either the letter or the spirit of the statute.
3. DEMURRER TO EVIDENCE—*Grounds—Insufficient Statement—Waiver—Joinder—Duty of Court.*—The failure of a demurree to evidence to object to the grounds of demurrer because not as specific as he desires is not a waiver of the requirement of the statute that the demurrant shall state the grounds of his demurrer with rea-

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sonable certainty, and that no other grounds than those so stated shall be considered, nor does it give the court the right to consider such grounds.

Error to a judgment of the Circuit Court of the city of Alexandria in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

J. K. M. Norton and *Edmund Burke,* for the plaintiff in error.

Francis L. Smith and *Williams, Tunstall & Thom,* for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is the second time this case has been to this court. On the former writ of error, the Southern Railway Company was the plaintiff in error; the judgment against it was reversed because of an erroneous instruction as to the right of the railway company to the defense of the statute of limitations, and the cause remanded for a new trial. *Southern R. Co.* v. *McMenamin,* 113 Va. 121, 73 S. E. 980.

The judgment complained of in the present writ of error was rendered upon a demurrer to the evidence.

One of the assignments of error is that "the grounds of demurrer to the evidence upon the facts and circumstances of the case were not sufficiently specific under the statute to reasonably disclose the sole ground of demurrer relied on, namely, that the plaintiff had failed to prove ownership by the defendant of the instrumentalities which caused the injury complained of.

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The grounds of demurrer assigned were as follows:

"(1) The evidence shows no actionable wrong to the plaintiffs by this defendant.

"(2) The evidence shows even if the plaintiffs had a cause of action against the defendant, which this defendant denies, the same is barred by the statute of limitations.

"(3) The evidence fails to show that this defendant has committed any wrongful act in the premises.

"(4) There is no proof of any damages sustained by the plaintiffs sufficient to form the foundation of a verdict."

It is not contended that the second and fourth of these grounds were sufficient to authorize the consideration of the question of whether or not the evidence proved the ownership by the defendant of said instrumentalities. The matter, therefore, to be determined is whether or not the first or third ground of demurrer stated authorize its consideration.

By an act approved February 19, 1912, amending an act approved March 14, 1906, entitled "An act relating to demurrers to evidence" (Acts 1912, p. 75), it is provided that "In all suits or motions hereafter, when the evidence is concluded before the court and jury, the party tendering the demurrer to evidence shall state in writing specifically the grounds of demurrer relied on, and the demurree shall not be forced to join in the said demurrer until the specific grounds upon which the demurrant relies are stated in writing; nor shall any grounds of demurrer not thus specifically stated be considered, except that the court may, in its discretion, allow the demurrant to withdraw the demurrer; may allow the joinder in demurrer to be withdrawn by the demurree, and new evidence admitted, or a non-suit to be taken until the jury retire from the bar."

The object of that statute was at least two-fold—first, to require the demurrant to give notice in writing of the grounds or causes of demurrer which he intended to rely

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on, and, second, to prevent him from assigning grounds of demurrer in the appellate court wholly different from those relied on in the trial court.

As was said by the president of the court in *Bonos* v. *Ferris Co.*, 113 Va. 497, 75 S. E. 126, the degree of particularity within which the grounds of demurrer should be stated in order to meet the requirements of the statute and thus accomplish the purposes for which it was enacted, "must depend to some extent upon the character of the case."

This is an action of trespass on the case, brought to recover damages for injuries resulting, as alleged, from the maintenance by the defendant company of a nuisance on its property. Two pleas were filed, the general issue and the statute of limitations. Upon the first trial (the record of which upon the former writ of error may be looked to by the court—Code, sec. 3463) various defenses were relied on, but it was not claimed by the defendant that it was not the owner of the instrumentalities which inflicted the injury complained of. On the contrary, it introduced evidence, not only to prove that it was the owner, but also to show how and under what circumstances it had acquired the title. Upon the last trial, the one in which the judgment complained of was rendered, the counsel for the defendant company, in his opening statement to the jury, as certified by the trial court in bill of exceptions No. 1, "stated that the defendant and those from whom it derived title had been operating a railroad and yards at the place complained of since before the Civil War; that the three tracks of the Washington Southern Railroad, which were next to the property of the plaintiffs, had been used by great numbers of trains for many years; that the through tracks of the defendant, which were south of the Washington Southern tracks, had been used by great numbers of trains for many years; that the yards of the de-

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fendant had been much more used formerly; that for nearly five years before the commencement of this suit the passenger trains of both roads did not use the tracks back of the plaintiffs' property, but the same were run by the Union Station, outside of the city of Alexandria, and for nearly five years before suit brought, a large part of the freight trains went to the Potomac yards of the Washington Southern Railroad, situated north of the city; that the defendant in its yards did far less business than formerly, using only one yard engine, instead of three formerly used; that the defendant erected and completed the coal chute in 1904 and if the plaintiffs were damaged by its operation, which defendant denied, that such damage commenced over five years before the commencement of the suit and plaintiffs were barred from recovering by the statute of limitations.

In the examination and cross-examination of witnesses, both parties seem to have proceeded upon the theory that the defendant was the owner of the instrumentalities in question. Under these circumstances, if the defendant intended in its demurrer to the evidence to rely upon the fact that its ownership of these instrumentalities had not been proved, it was incumbent upon it to plainly state that ground of demurrer in its written statement, or at least to specify it with reasonable certainty. It is not contended by counsel for the defendant, either in their written or oral argument, that either of the grounds of demurrer do specifically or plainly state that its ownership of the said instrumentalities had not been proved, but their contention is that they embrace that proposition. This is true, but they also embrace other propositions equally fatal to the plaintiff's case, if not sustained by the evidence. Neither of them gave much, if any, more information to the demurree as to the real ground intended to be relied on than the general demurrer under the old

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practice would have done. They no more specified the cause of demurrer afterwards actually relied on than they do any other of the several causes embraced within them.

It is urged in argument that the grounds refer to "this defendant" and paraphrasing these grounds they mean first that the evidence showed no actionable wrong to the plaintiffs by the Southern Railway Company, and, second, the evidence failed to show that the Southern Railway Company had committed any wrongful act in the premises.

The use of the terms "*this* defendant" could have no different meaning from "the defendant," since the Southern Railway Company was the only defendant in the case. If there had been two or more defendants, there would be some plausibility in that contention.

If such a general specification of the grounds of demurrer were held to be sufficient, it would follow that any specification broad enough in its language to embrace or comprehend any one of several grounds would serve the purpose of stating each and all of them. Such a holding would not be in accord either with the letter or the spirit of the statute. The statute would practically fail of the purposes for which it was enacted, for the demurree would not know which of the causes of demurrer embraced or comprehended within the language of the grounds stated was to be relied on and the demurrant could rely upon one or more of them in the trial court and upon others in the appellate court.

It is further argued that the plaintiffs had the right to object to the grounds of demurrer if they were not as specific as they desired, and that by their failure to do so they waived the requirement of the statute.

The statute does provide that the demurree shall not be required to join in the demurrer until the specific grounds upon which the demurrant relies are stated in writing; but it further provides that no ground not thus specifically stated shall be considered by the court. The

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failure of the demurree to exercise his right to refuse to join in the demurrer until the grounds of demurrer were stated as required by the statute does not give the court the right to do what the statute expressly declares it shall not do. *C. & O. Ry. Co.* v. *Rowsey,* 108 Va. 632, 62 S. E. 363. Nor does it relieve the demurrant from stating his grounds of demurrer as required by the statute, if he wishes the court to consider them. The demurrant knows, or ought to know, before demurring, in what respect the demurree has failed in his proof, and there is no more hardship in requiring him to specifically state it than there is in requiring a party demurring to a declaration to state specifically his grounds of demurrer. One is a demurrer to his adversary's pleading, and the other to his adversary's proof. In both cases the legislature, it is clear, intended that the grounds of demurrer must be stated with reasonable certainty and that no other grounds than those so stated should be considered. Code, sec. 3271; *Bonos* v. *Ferries Co., supra.*

It is further insisted that this court has, in the case of *Miars* v. *Norfolk & Portsmouth Traction Co.,* by refusing a writ of error, held that grounds of demurrer no more specific than those filed in this case were sufficient and that further argument upon principle is therefore unnecessary.

An examination of the record in that case shows that the particular ground or cause of demurrer relied on was not stated specifically, but that the grounds of demurrer stated were broad enough to embrace or comprehend it as well as other grounds—as in this case. As before stated in this opinion, we do not think that a statement of the grounds of demurrer to evidence, where language is broad enough to embrace or comprehend any one of several causes of demurrer, but which fails to specify any one of them as the particular ground or cause relied on with reasonable certainity considering the facts and circum-

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stances of the particular case, can be considered as sufficient under the statute, and that in so far as the court's action in the *Miars case* is in conflict with this view it ought not to be followed.

Sometimes placing a construction upon a statute affecting questions of practice different from that which has theretofore obtained results in injustice or hardship in the particular case, and courts, on that account, regret the necessity of making such change, although they are clearly satisfied that the later ruling is the proper one and necessary to give effect to the legislative intent. In this case, however, we have no such feeling, for it clearly appears from the express and unqualified admissions or declarations of the defendant's counsel in his opening statement that his client was the owner of the instrumentalities which inflicted the injuries complained of.

It follows from what has been said that we are of opinion that the trial court erred in considering the question of whether or not the evidence showed that the defendant was the owner of the said instrumentalities, since that cause of demurrer was not specifically stated within the meaning of the statute, under the facts and circumstances of this case.

Having reached this conclusion, it is unnecessary to consider the other errors assigned, as their decision could not affect the result.

The judgment complained of will be reversed, and this court will enter judgment, as the trial court should have done, in favor of the plaintiff.

Reversed.

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Syllabus.

Richmond

METROPOLITAN LIFE INSURANCE COMPANY v. O'GRADY.

January 15, 1914.

1. EVIDENCE—*Admissions—Admissibility—Lack of Interest When Made.* The general rule is that the declarations of a party to the suit, or a person who has an interest therein, are admissible in evidence against such party or such person. One of the qualifications of the rule, however, is that the declarations or admissions which are thus receivable in evidence must be those of a party or person having at the time they are made some interest in the matter afterwards in controversy in the suit to which he is a party or in which he has an interest.
2. EVIDENCE—*Insurance—False Representation of Age—Admission of Assured—When Admissible.*—In an action on a life insurance policy, where defense is made on the ground that the insured had falsely and fraudulently misrepresented his age or the condition of his health, his declarations as to his age or his health cannot be received in evidence against the beneficiary in the policy to prove the truth of the representations, but after evidence has been introduced tending to show that his age or health was different from what he represented it to be, such declarations may be received to show that he had knowledge of his age or the condition of his health and falsely and fraudulently misrepresented the same.
3. EVIDENCE—*Verbal Admissions—Received With Caution—Lapse of Time—Failure to Identify—Rejection—Not Reversible Error.*—Evidence of *verbal admissions* ought to be received with great caution because of the liability of witnesses to mistake or misunderstand the admissions when made, and to remember inaccurately or to misrepresent it afterwards. This rule applies with peculiar force where such evidence is to affect the rights of third persons. Where the declarations were made in a casual conversation five or six years before the witness testified, and do not appear to have been distinctly remembered or precisely identified, the ruling of the trial court in either admitting or rejecting them ought not to constitute reversible error.

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Error to a judgment of the Law and Equity Court of the city of Richmond in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Wellford & Taylor, for the plaintiff in error.

Meredith & Cocke, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is an action upon a policy of insurance on the life of John F. O'Grady, brought by his widow, the beneficiary therein, against the Metropolitan Life Insurance Company of New York.

One of the errors assigned is to the action of the court in refusing to permit Dr. Reams to testify as to certain admissions or declarations made by the insured before the policy sued on was taken out.

The general rule unquestionably is, as claimed by the defendant company, that the declarations of a party to the suit, or a person who has an interest therein, are admissible in evidence against such party or such person. 1 Greenleaf on Ev., sec. 11. This general rule is, however, subject to some qualifications or exceptions. 1 Greenleaf on Ev., sec. 179; *Burton* v. *Scott, &c.,* 3 Rand. (24 Va.) 399, 407-410; *Gain's Admr.* v. *Alexander,* 7 Gratt. (48 Va.) 257, 261. One of the qualifications is that the declaration or admissions which are thus receivable in evidence must be those of a party or person having at the time they are made some interest in the matter afterwards in controversy in the suit to which he is a party or in which he has an

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interest. Same authorities last above cited. The principle upon which such admissions are made evidence, as was said in *Burton* v. *Scott, supra,* "Is the reasonable presumption that no person will make any declaration against his interest that is not founded in truth." If, therefore, at the time the declarations were made such party or person had no interest in the matter afterwards in controversy in the suit to which he is a party or in which he has an interest, such declarations are not admissible in evidence.

In *Burton* v. *Scott,* it was so held as to the widow of a testator, although not a party to the record. In discussing the question, where the declaration of the wife was made before the will under which her interest was derived, Judge Carr said, speaking for the court: "Before its date she could not know that she would be left a penny; she could not know that it (the will) would not be so written as to oblige her to renounce it and fly to the law for her support. She had not then that motive so powerful as to afford a safe guarantee that she would make no declaration as to the incapacity of her husband which was not founded in truth."

In *Gain's Admr.* v. *Alexander, supra,* it was held that the paper relied on as an admission, having been executed by the defendant before he qualified as administrator, was not competent evidence as an admission of a party to the record. In that case *Burton* v. *Scott* was cited with approval, and the principle upon which it rested was reiterated and applied. Upon principle and under our decisions the action of the court in rejecting the evidence in question was clearly right.

Another error assigned is the refusal of the court to permit declarations of the insured to be introduced in evidence. The witness, Snelling, who was an agent of the defendant company, when asked if he had ever had any talk with the insured with reference to his health, answered:

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"I think that on one occasion Mr. O'Grady and I was talking and he remarked to me—I think as far as I can remember how the conversation come up—we were talking about insurance and he said he couldn't get any insurance then on account of his health. This is about the sum and substance of our remarks at that time." The witness said that he did not know whether or not Mr. O'Grady was then thinking about taking out insurance. The witness further stated that the said conversation, as well as he could remember, was five or six years before the death of the insured. The court then asked the witness if what he had told constituted the entire statement made to him by the insured, and his reply was, "I think so; yes, sir." The court thereupon sustained the objection to the evidence, to which the defendant company excepted. Immediately afterwards its counsel asked the following question: "Did Mr. O'Grady say anything in that connection about having consulted numerous doctors about the trouble from which he was suffering, and if so, what was said by Mr. O'Grady?" Upon objection to that question, the court said: "The question is rather leading in form and the witness has already been asked whether his first statement embraces substantially all that passed between Mr. O'Grady and himself; but the witness will be permitted to answer the question for the consideration of the court. That question was then withdrawn and the witness asked: "Did Mr. O'Grady state the trouble from which he was suffering and whether he had consulted physicians about it?" To which he replied: "Mr. O'Grady did not state to me his trouble—but he said he had had all kinds of doctors and taken all kinds of medicines, and he referred to R. E. L. Jones, stating that his medicine had done him more good than any doctor's medicine he had ever taken." The court adhered to its former ruling and rejected the whole of Snelling's evidence.

In an action on a life insurance policy, where defense is

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made on the ground that the insured had falsely and fraudulently mispresented his age or the condition of his health, his declarations as to his age or health cannot be received in evidence against the beneficiary in the policy to prove the truth of the representations, but after proof has been introduced tending to show that his age or health was different from what he represented it to be such declarations may be received to show that he had knowledge of his age or the condition of health and falsely and fraudulently misrepresented the same. *Union Central Life Ins. Co.* v. *Pollard,* 94 Va. 146, 156, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715.

It is well settled that evidence of *verbal admissions* ought to be received with great caution because of the liability of witnesses to mistake or misunderstand the admission when made, and to remember inaccurately or misrepresent it afterwards. *Horner* v. *Specd,* 2 P. & H. 616; 1 Green on Evidence, sec. 200 (Redfield's Ed.)

If this be the rule where the verbal admission is to affect the party or person who made it, it ought to apply with greater force where it is to affect the rights of another.

The declarations in question having been made in a casual conversation five or six years before the witness testified, and not appearing to have been distinctly remembered or precisely testified, we cannot say that the trial court erred in rejecting the evidence—at least, it is of such a character that whether admitted or rejected it ought not to constitute reversible error.

The remaining assignment of error is to the action of the court in overruling the demurrer to the evidence. The grounds of demurrer were—

"First: That the statements and descriptions and answers to interrogatories as to his health and as to the attendance upon him by physicians made by the applicant in the application for the insurance policy sued on were wilfully false and fraudulently made, and were material.

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"Second: That the policy sued on was obtained by reason of misstatements and concealments of material facts by the insured at the time of his examination by the physician of defendant, as set forth in the application for the said policy."

As the facts and circumstances of the case are such as are not likely to exist together in another case, no good purpose could be accomplished by discussing them in detail. It will be sufficient, therefore, to say, that while there is evidence which tends strongly to show that the insured did not answer the interrogatories propounded in the application for insurance, either as to his health or the physicians he had consulted, as fully and as correctly as he should have done, yet upon careful consideration of all the evidence both written and oral, we cannot say on demurrer to the evidence that his answers and statements were wilfully false and fraudulently made, or that the policy was obtained by reason of misstatements and concealment of material facts. The judgment must, therefore, be affirmed.

Affirmed.

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Richmond

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK v. BOARD, ARMSTRONG AND COMPANY, CORPORATION.

January 15, 1914.

1. LIFE INSURANCE—*Insurable Interest—Officer of Corporation—Loss of Services—Premium Paid by Corporation—Ultra Vires Act.*—An insurance policy taken out in good faith by the principal incorporator of a corporation, who was also its president and general manager, for the benefit of the corporation which paid the premium in order to protect the corporation and its creditors by reason of his death, is not *ultra vires* on the part of the corporation, and the "loss of services in the event of death," if real, is a sufficient interest in the life of the insured to maintain the policy in favor of the beneficiary.
2. LIFE INSURANCE—*Insurable Interest—What Constitutes.*—Any reasonable expectation of pecuniary benefit or advantage from the continued life of another, whether direct or indirect, creates an insurable interest in such life, though there be no claim upon the person whose life is insured that can be recognized at law or in equity. The essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the assured has no interest.

Error to a judgment of the Circuit court of the city of Alexandria in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

John M. Johnson, for the plaintiff in error.

S. G. Brent, Charles E. Plummer, C. E. Nicol and *Gardner L. Boothe,* for the defendant in error.

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HARRISON, J., delivered the opinion of the court.

This action was brought by the plaintiff corporation to recover of the defendant life insurance company the amount of a policy issued by it for the benefit of the plaintiff upon the life of B. F. Board, its president and general manager. There was a verdict and judgment in favor of the plaintiff to which this writ of error was awarded.

The record shows that the plaintiff was a Virginia corporation, with B. F. Board, its principal incorporator, as president and general manager; that in order to protect the corporation and its creditors from any loss by reason of his death, he approached the agent of the defendant insurance company and stated that he desired to have his life insured for the benefit of the corporation; that the insurance had been solicited by the agents of other companies, and asked if the defendant wrote insurance of that kind. He was informed by the agent that the defendant company did issue such policies, and would be glad to write the policy for him. Thereupon, the policy was, in due course, issued upon the life of B. F. Board for the benefit of the plaintiff, the premium $234.25 being paid by it. Both the application and the policy state that the interest of the beneficiary in the insured was "Loss of services in the event of death."

It clearly appears that the insurance company, with full knowledge of all the facts, wrote and delivered the policy sued on, and that both parties were acting in good faith in making the contract.

We are of opinion that the demurrer to the plaintiff's declaration was properly overruled. We are further of opinion that this contract of insurance effected by the plaintiff was not an *ultra vires* act on its part, and that the "Loss of service in the event of death," as stated in the policy, was a sufficient interest to maintain the policy

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in favor of the beneficiary. The principal ground upon which the defendant seeks to avoid this policy is that the plaintiff had no insurable interest in the life of B. F. Board. The deceased was the president and manager of the corporation, and had been since its organization. His relation to and knowledge of the financial and manufacturing interests of the plaintiff was such that his death could not fail to result in serious and substantial loss to its creditors and all others interested in its prosperity. Although it is well known that the leading insurance companies of the country solicit and carry the class of insurance here involved, we have been unable to find any decision directly in point. The principles, however, announced by the decisions and stated by the text-writers we think clearly show that the plaintiff had an insurable interest in the life of B. F. Board, its president and general manager.

In the case of *Mechanics National Bank* v. *Comins*, 72 N. H. 12, 55 Atl. Rep. 191, 101 Am. St. Rep. 650, it was held that any reasonable expectation of pecuniary benefit or advantage, either directly or indirectly, from the continued life of another, creates an insurable interest in such life, though there may be no claim upon the person whose life is insured that can be recognized in law or in equity. The opinion says in part: "It is hardly necessary to say that the success of a corporate enterprise may be so interwoven with the personality of its manager that its stock is taken, and money is loaned to carry it on, as much in reliance upon that personality as upon the intrinsic merit of the enterprise; and no good reason appears why a stockholder or creditor, the value of whose investment may be reasonably said to depend upon the life or health of the man at the helm, should not have an insurable interest in his life, the same as one who invests money in a partnership, relying upon the skill or experience of his co-partner, has an insurable interest in the life of the latter, or one

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who equips a mining expedition has an insurable interest in the life of him to whom its management is committed. The creditor or stockholder, under such circumstances, would seem to have that 'reasonable expectation of pecuniary benefit or profit from the continuance of another's life' which is held sufficient to constitute an insurable interest. In such case 'the essential thing, that the policy should be obtained in good faith and not for the purpose of speculating upon the hazards of life,' would appear to be present. In this view we are not prepared to say, as matter of law . . . that the plaintiffs, who were furnishing the funds to carry on the business of the George T. Comins Company, had no insurable interest in the life of George T. Comins, the manager, and apparently the originating and directing personality in the enterprise."

In the case of *Keckley, et als.* v. *Coshocton Glass Co.*, and *Gainor* v. *Samo,* decided by the Supreme Court of Ohio on June 5, 1912, and reported in 99 N. E., page 299, it is held that, "Where a person is the owner of a large portion of the stock of a corporation and by reason of his skill and experience he is largely relied upon to make the business of the corporation a success, and when, in borrowing money of banks and in dealing with creditors, and in inducing other persons to buy stock in such corporation, he represents that he has insured his life for the benefit of the corporation, and that the policies therefor are assets of the corporation, such facts disclose an insurable interest in the corporation; and such insured person and his legal representatives are estopped from claiming that such policies are not based upon an insurable interest, or that the amounts due thereon do not belong to the corporation."

In *Conn. Mutual Life Ins. Co.* v. *Schaefer,* 94 U. S., page 457, 460 (24 L. Ed. 251), it is said: "Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of

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another, creates an insurable interest in such life. . . . The essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest."

In the case of *Lewis* v. *Palmer, et als,* 106 Va. 522, 56 S. E. 341, the following language was used by this court: "Whenever there is such a relationship that the insurer has a legal claim on the insured for services or support, or when, from the personal relation between them, the former has a reasonable right to expect some pecuniary advantage from the continuance of the life of the other, or to fear loss from his death, an insurable interest exists."

In May on Insurance, vol. 1, sec. 76, it is said: "As to what amounts to an insurable interest, there has been much discussion in the courts, without hitherto arriving at any satisfactory definition. It may be said generally, however, that while the earlier cases show a disposition to restrict it to a clear, substantial, vested pecuniary interest, and to deny its applicability to a mere expectancy without any vested right, the tendency of modern decisions is to relax the stringency of the earlier cases, and to admit to the protection of the contract, whatever act, event, or property, bears such a relation to the person seeking insurance that it can be said with a reasonable degree of probability to have a bearing upon his prospective pecuniary condition."

In Bliss on Insurance, sec. 21, page 27, it is said: "The tendency of the American decisions, especially the more recent ones, is to hold that wherever there is any well founded expectation of or claim to any advantage to be derived from the continuance of a life there is an insurable interest in that life, though there may be no claim upon the person whose life is insured that can be recognized in law or in equity."

In Vance on Insurance, page 1279, it is said: "An insurable interest exists whenever the relation between the as-

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sured and insured, whether by blood, marriage or commercial intercourse, is such that the assured has a reasonable expectation of deriving benefit from the continuation of the life insured, or of suffering detriment or incurring liability through its termination."

The cases cited on behalf of the defendant are not opposed to the established principles announced by the authorities we have mentioned. In the case at bar there is not a suggestion in the record that even raises an inference that the policy was intended as a wagering transaction. On the contrary, the facts show that it was *bona fide* and consummated with the honest purpose of protecting the plaintiff against loss in the event of the death of its president and general manager. The agent of the defendant announced that his company was accustomed to issuing such policies, and requested the insured to allow him to procure the insurance for him from his company. The record shows that the death of the insured was a substantial loss to the beneficiary that cannot be repaired otherwise than by requiring the insurance company to comply with its contract. We perceive no reason why, under all the facts and circumstances of this case, the plaintiff should not thus have the right to protect itself against loss, nor do we perceive, from the facts before us, any reason for holding that the transaction is obnoxious to public policy.

We are further of opinion that the evidence is wholly insufficient to sustain the defense that the insured was insane and committed suicide as a result of such insanity. This court has already settled that question adversely to the defendant by refusing it an appeal in the case of *Jessie P. Board* v. *Mutual Life Insurance Company,* where the sole defense was suicide as a result of insanity. The evidence in support of that defense is practically the same in both cases, and it is clearly insufficient to sustain the con-

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tention that the deceased committed suicide from any cause. *South Atl. Life Ins. Co.* v. *Hurt's Admx., ante,* page 398, 79 S. E. 401.

We are further of opinion that the court did not err in refusing to set aside the verdict. No other proper verdict could have been found than that which was returned.

The judgment complained of is plainly right, and must be affirmed.

Affirmed.

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Richmond

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK v. BOARD MOTOR TRUCK COMPANY, CORPORATION.

January 15, 1914.

SEE *Mutual Life Insurance Co.* v. *Board, Armstrong & Co., Corporation, ante, p. 836.*

Error to a judgment of the Circuit Court of the city of Alexandria.

Affirmed.

John M. Johnson, for the plaintiff in error.

S. G. Brent, Charles E. Plummer, C. E. Nicol, and *Gardner L. Boothe,* for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This is a companion case to that of *Mutual Life Ins. Co. of N. Y.* v. *Board, Armstrong & Company, Corporation,* in which an opinion is handed down at the present term of the court. The facts are identical in both cases and the questions raised the same in each; indeed, the cases were argued together as one case, and for the reasons already given in the companion case mentioned, the judgment in this case must be affirmed.

Affirmed.

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Richmond

NEWTON, SURVIVING EXECUTOR v. WHITE.

January 15, 1914.

Absent, Cardwell, J.

1. ASSIGNMENTS—*Partial Assignment—Deed of Trust—How action Brought.*—A deed of trust on a chose in action is an assignment *pro tanto* of the chose, and an action thereon in the name of the assignor for the benefit of himself and the creditor secured is properly brought.
2. CONTRACTS—*Consideration—Promise—Landlord and Tenant.*—If a lessee contracts to erect buildings on the leased premises, and the lessor covenants that he will at the end of the lease take the buildings so to be erected at a fair valuation, this constitutes a promise by the lessor, supportd by a valuable consideration, to pay the lessee for such buildings.
3. LANDLORD AND TENANT—*Building by Lessee—Lessor to Take at Valuation—How Value to Be Ascertained in Case at Bar.*—If a lessee covenants to erect buildings on the leased premises to cost not less than $2,000 nor more than $3,000, and the lessor covenants that at the termination of the lease he will take the buildings so to be erected at a fair valuation to be ascertained by considering what it would cost to erect them at the time of such valuation and deducting therefrom a reasonable allowance for the wear and tear thereof, this does not require the appraisers to start with a maximum valuation of $3,000 for the building and deduct therefrom the reasonable wear and tear, but the appraisers are to take the estimated costs at the time of valuation, whatever that may be, and deduct therefrom the reasonable wear and tear, and the balance to an amount not exceeding $3,000 is what the lessor is to pay. That is the utmost extent of his liability, although, at a fair valuation, the building may be worth much more, but the limitation was not designed, nor has it the effect, to prevent the recovery by the lessee of the fair value of the buildings at the time of their surrender to the lessor, provided such value is not in excess of $3,000.

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4. LANDLORD AND TENANT—*Tenant From Year to Year—Covenants of Grantor—Continuation.*—Where property is leased for a fixed and definite term and the lessor agrees to take at valuation, at the end of that term, buildings to be erected on the leased premises by the lessee, and the tenant is permitted to hold over from year to year for six years without any new contract, express or implied, this carries with it a continuation of the lessor's promise to pay for the buildings at the termination of the relation of landlord and tenant. The law presumes the holding to be upon the terms of the original lease, subject to the same rent and to the covenants of the original lease, so far as applicable to the new condition of things.
5. APPEAL AND ERROR—*Harmless Error—Irrelevant Evidence—Cost.*—The fact that the reading of a will in evidence was unnecessary and entailed a useless expense does not constitute reversible error.
6. APPEAL AND ERROR—*Case Heard by Trial Court—Evidence Sufficient to Support Judgment.*—Where the whole matter of law and fact is submitted to the trial court, without the intervention of a jury, its judgment will not be set aside where the evidence, considered as on a demurrer to the evidence, is sufficient to support the judgment.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Robert W. Tomlin, and *William G. Maupin,* for the plaintiff in error.

J. Sidney Smith, for the defendant in error.

KEITH, P., delivered the opinion of the court.

George Newton, the defendant's testator, in October, 1895, made a lease to Ira B. White and William P. Dodson doing business as White & Dodson, for a certain lot of land

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in Norfolk city, the said lease being for the term of eleven years, beginning on the 10th of October, 1895, and expiring on the 9th of October, 1906. By this lease the lessees covenanted to erect and maintain on the demised premises a brick building, which should cost not less than $2,000 and not more than $3,000. George Newton covenanted for himself and his assigns with the lessees and their assigns that he would at the termination of the lease take the building so to be erected at a fair valuation, which valuation, if the lessor and lessees could not agree thereon, was to be determined by two valuers and an umpire to be selected as follows: At least sixty days before the termination of the lease the lessor and the lessees were each to select a valuer, who should be a master builder, and each was to give notice to the other party of the valuer so chosen. The two valuers thus selected were required to select an umpire, to be also a master builder, who should decide between them in the event of their failing to agree upon the value of the building. The valuers so chosen, or in case of their disagreement the umpire, were directed to reach their valuation as follows: They should consider what would be the cost at the time of their valuation of erecting the building, and then deduct from such cost a reasonable allowance for the wear and tear thereof since its erection and at the time of such valuation. They were forbidden to estimate or consider the value or eligibility of the location of the said building, or to be influenced by any sales thereof at any time, and their valuation was limited and confined exclusively to the building without any regard to the lot of land on which it stood or its eligibility. It was further provided that if either party or their assigns should fail within five days after notice of the appointment of a valuer by the other party to appoint a valuer and notify such other party of such appointment, then the other party who had made such appointment, or his assigns, might select

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and appoint a valuer for the party so failing to make such appointment, and give notice thereof. In this event the two valuers should select an umpire, being also a master builder, and they should estimate, fix and determine the value of the building in the same manner and under the same restrictions as above set forth. The lessor bound himself, his heirs and assigns, to pay to the lessees at or before the expiration of the term of the lease the amount of money which said valuers or umpire, should they disagree, had determined on as the amount to be paid for said building.

The lessees entered upon the demised lot, erected a building costing something less than $3,000, and remained in possession thereof until the 10th day of May, 1907, when William P. Dodson, one of the lessees, by deed of that date, conveyed to the other partner, Ira B. White, all of his interest in said lease. By deed of trust of May 10, 1907, Ira B. White assigned and conveyed to R. M. Hughes, Jr., trustee, all of his interest in said lease to secure Lallah L. Batten a debt of $1,700, which debt has never been paid and which deed of trust has never been released.

The lease above described expired by limitation at midnight on the 9th day of October, 1906. No new lease was made between the parties and no new contract, express or implied, was entered into by them regarding the leased premises or the building thereon, but the original lessees simply held over for one year, paying rent and discharging other obligations imposed by the lease, and thereafter one of them, White, continued to hold under similar circumstances until the 10th day of October, 1912. On this last named date the lease was terminated, White having given three months' notice of his intention to terminate to Newton, surviving executor of George Newton. More than sixty days before October 10, 1912, White gave notice to Newton, surviving executor, of the appointment of a valuer chosen by White to estimate the value of the building in

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accordance with the terms of the lease, and calling upon Newton also to appoint a valuer. Newton declining to make any appointment, White appointed one for Newton. The two valuers thus named by White met, and on the 6th day of September, 1912, estimated that the building would cost on that date to erect the sum of $3,680. From this they deducted for wear and tear the sum of $700, thus making the value of the building on September 6, 1912, the sum of $2,980. Having given no notice to Newton of the date and place of their meeting, the valuers on October 21, 1912, served a written notice upon Newton that they had appointed Jesse Johnson as an umpire, and that they would meet with Johnson on October 26, 1912, at one o'clock p. m., at a certain designated point. They accordingly met again on said date and reaffirmed their valuation of September 6, 1912. This action, claiming $2,980, based upon this valuation, was instituted on the 30th day of October, 1912, four days after the last meeting of the alleged valuers and umpire.

The declaration, which is in assumpsit, contains the general counts in assumpsit and two special counts. These special counts were demurred to, and the demurrer to the second was sustained. The parties went to trial upon the general counts and the first special count, and a judgment was recovered against the defendant for the whole amount claimed, $2,980, and to that judgment a writ of error was awarded to Newton's executor.

The first error assigned is that the demurrer to the first special count should have been sustained.

The first special count sets out substantially the facts already stated and files as exhibits the several deeds and leases from George Newton and his wife to Ira B. White and William J. Dodson, from Dodson to White, and from White to Hughes, trustee.

The grounds of demurrer to the first special count are:

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"(1) That the said count and the papers referred to therein, and therein termed exhibits, show that the plaintiff has no right to bring this action.

"(2) That the said count states no consideration for any promise of the said defendant.

"(3) That the said count alleges no promise of the said defendant nor any breach thereof.

"(5) That the said count and the paper therein referred to as Exhibit 'A,' show that George Newton made no contract whereby he could become liable to pay the $2,980 claimed in said count.

"(6) That the said count does not contain the averments which the laws of pleading require in regard to such contracts as the alleged lease, upon which said count is based.

"(7) That by reason of the vagueness of the statements made in said count and the omissions of statements which should be made, said count does not fulfil the requirements of the laws of pleadings."

The sixth and seventh grounds of demurrer may be disregarded. They are no more than an assertion that the declaration is not sufficient in law.

Coming to the more specific grounds of demurrer, we are of opinion that they are not well taken. The first ground rests upon the proposition that the original lease was made to White & Dodson, and that the right of action was originally in them. Dodson, however, having transferred his interest in the lease by deed to White, executed long before the institution of this suit, White sufficiently appears as the person solely interested in the covenant upon which the suit is brought, up to the time that he executed the deed of trust upon his lease to Robert M. Hughes, Jr., to secure a debt to Lallah L. Batten. The effect of that deed was to create a lien upon the house erected upon the leased premises in favor of Lallah L.

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Batten, the beneficiary, and constituted a partial assignment of the claim against the lessor defendant. But for that assignment or the lien thus created, Ira B. White would have been the sole beneficiary and claimant for the value of the house erected upon the leased premises, and in him would have been the sole right to institute an action to recover its value. The deed from Ira B. White to Hughes may be regarded as a complete assignment of a chose in action, vesting in Hughes a right to institute suit for its recovery. If that had been done and the $2,980 had been recovered, it is obvious that the recovery should have been for the benefit of Lallah L. Batten to the extent of her interest, and as to the residue it would have been for the benefit of Ira B. White, who owned it, subject only to the Batten lien. Instead of pursuing this course, the suit was brought by White, suing on behalf of himself and Lallah L. Batten, which seems to reach the same result and to violate no rule of law.

Speaking of partial assignments, Burks on Pleading, at page 56, says: "While the owner of a non-negotiable chose in action is permitted to assign it, the assignment must be of the whole debt. He cannot split up his demand and assign a portion of it to one person and another portion to another so as to enable them to maintain separate actions for their different portions. If partial assignments have been made, the action must be in the name of the assignor. A single cause of action arising on an entire contract cannot be divided by partial assignments so as to enable each assignee to sue for the part assigned." Citing *Phillips* v. *Portsmouth,* 112 Va. 164, 70 S. E. 502.

The second ground of error is not well taken. By the lease the lessees covenant to erect and maintain on the demised premises a brick building which should cost not less than $2,000 nor more than $3,000; and George Newton covenanted for himself and his assigns that he would

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at the termination of the lease take the building so to be erected at a fair valuation, which valuation, if the lessor and lessees could not agree thereon, was to be determined in a mode prescribed by the lease. And the same provision which we have above extracted from the lease disposes of the third ground of demurrer, which is that the special count alleges no promise of defendant, nor any breach thereof.

The fifth ground of demurrer is thus stated in the petition for a writ of error: "That George Newton's estate could not under any circumstances be liable for as much as $2,980, and for proof of this the court is simply referred to the lease filed with the declaration. That lease limited Newton's possible maximum liability by requiring appraisers to start with a valuation not in excess of $3,000, and from that to deduct wear and tear, etc., for eleven years, whereas the declaration and the papers filed with it show that the appraisers started with a building supposed to cost $3,680, and after making deductions for seventeen years have found the Newton estate liable for $2,980, only $20 less than the maximum original cost of the building."

The provision of the lease upon this point is as follows: "And the said George Newton for himself, his heirs and assigns, covenants with the said parties of the second part and their assigns that he will at the termination of this lease take the buildings to be erected by the lessees on said premises at a fair valuation, which said valuation if the said lessor and lessees cannot agree thereon is to be determined by two valuers and an umpire . . . and that the valuers so chosen or the umpire in case of their disagreement shall consider what would be the cost at the time of such valuation of erecting the said building and then deduct from such cost a reasonable allowance for the wear and tear thereof, since its erection and at

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the time of such valuation, and that they shall not estimate or consider the value or eligibility of the location of the said building or be influenced by any sales thereof at any time, and that the said valuation shall be limited and confined exclusively to the buildings aforesaid, without any regard to the lot or its eligibility. . ."

The valuers under that provision would ascertain what would be the cost at the time of such valuation of erecting the building, and deduct from it a reasonable allowance for wear and tear since its erection, the object being to ascertain the fair value of the building at the time it was turned over by the lessee to the lessor. It is true that the valuation was limited to not more than $3,000, and there could be no recovery for a greater sum than that, a limit imposed, of course, in the interest of the lessor. That was the utmost extent of his liability, although at a fair valuation the building might have been worth more, but the limitation was not designed, nor has it the effect, to prevent the recovery by the lessee of the fair value of the building at the time of its return to the lessor, provided such value was not in excess of $3,000.

The last objection we will notice to the declaration is that Newton did not obligate himself or his estate to pay for any building on the leased premises after the expiration of the lease, which was October 10, 1906.

After the expiration of the original term of eleven years the lessee was permitted to hold over, and thereby extended the lease from year to year, and this condition of things continued for six years and carried with it a continuation of Newton's promise to pay for the building at the termination of the relation of landlord and tenant.

In *Hobday* v. *Kane,* 114 Va. 398, 76 S. E. 902, it is said: "Where the landlord suffers the tenant to remain in possession after the expiration of the original tenancy, the law presumes the holding to be upon the terms of the orig-

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inal demise, subject to the same rent and to the covenants of the original lease, so far at least as these are applicable to the new condition of things." Citing Taylor on Landlord and Tenant, section 525.

We know of no reason why that principle should not apply to the case before us.

We think that the demurrer was properly overruled.

During the progress of the trial objections were taken to rulings of the court upon the admission of testimony, the first of which was to the introduction of the original lease, on the ground that it showed upon its face that George Newton made no promise to pay anything for a building the value of which was to be ascertained at any time after the 10th day of October, 1906. We have sufficiently disposed of this in what was said upon the demurrer. The lessee having held over by permission of the lessor, the holding was presumed to be upon the terms of of the original demise. *Hobday* v. *Kane, supra.*

The second bill of exceptions was taken to the action of the court in permitting the will of George Newton to be read in evidence, as it was unnecessary and entailed a useless expense—which, if admitted to be true, does not constitute reversible error.

The third, fourth and fifth bills of exceptions present objections which are wholly insufficient to constitute reversible error, if error there were in the rulings made by the court, and need not be further noticed.

While it is not mentioned in the grounds of demurrer, and need not therefore have been considered, it is stated in the petition for a writ of error that the valuers gave no notice to Newton of the date and place of their meeting. In this the petition is plainly in error, as the record shows that the defendant in error, White, on the 21st of October, 1912, wrote to the executor as follows:

"This is to notify you that I hereby reaffirm the ap-

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pointment heretofore made by me of Messrs. Harvey Abrams and Jesse Johnson, as valuers, to appraise the warehouse on Newton's Lane, which was leased by George Newton and wife to White and Dodson, by lease duly of record." Signed "Ira B. White."

On the back of this letter appears the following: "Executed in the city of Norfolk this 22d day of October, 1912, by serving copy hereof on William Loyall Newton, executor of George Newton, deceased. J. F. Lawler, Segt., by C. L. Quinn, deputy."

And on the same day the executor was notified by the valuers that they were to "consider the matter of appraisement of the building at the office of Jesse Johnson, in the Law Building, Granby street, in the city of Norfolk, Virginia, on Saturday, October 26, 1912, at 1 o'clock P. M." Signed "Harvey Abrams, Jesse Johnson." And on the back of this paper appears the following: "Executed in the city of Norfolk this 22nd day of October, 1912, by serving a copy hereof on William Loyall Newton, sole surviving executor of George Newton, deceased. J. F. Lawler, Segt., by C. L. Quinn, deputy."

The seventh ground of exception is to the action of the court in overruling the motion of the defendant for a new trial, on the ground that the verdict was contrary to the law and the evidence.

The whole matter of law and fact was submitted to the court without a jury, and upon the evidence submitted to the court, considered as upon a demurrer to the evidence, there can be no question that it was amply sufficient to support the judgment.

We are, therefore, of opinion that there was no error in the judgment complained of, which is affirmed.

Affirmed.

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Syllabus.

Richmond

PEEK v. CITY OF HAMPTON.

January 15, 1914.

1. NAVIGABLE WATERS—*Bridge—Authority of Legislature.*—Where a bridge has been built over a navigable stream under authority of an act of the legislature, the expediency of building the bridge is not thereafter an open question.
2. APPEAL AND ERROR—*Objections for First Time—Case at Bar.*—Where it was agreed by counsel in the lower court that a bridge complained of was constructed "under legal authority" and the jury has been instructed, at the instance of the plaintiff, that the legal power of the defendant "to build the bridge in its present location is not an issue before them," the plaintiff will not be permitted to contend in this court for the first time that the bridge was built without legal authority.
3. INSTRUCTIONS—*Evidence to Support.*—Instructions are properly refused when there is no evidence tending to prove the facts upon which they are based.
4. NAVIGABLE WATERS—*Land Between Low Water and Navigability—Ownership—Injury to—Damages.*—While the fee-simple title of a riparian owner on navigable water ends at low water mark, yet between that point and the line of navigability he has a right known as riparian right, which is valuable, and, when once vested, the owner cannot be deprived of it, except for the public good, and, if taken or injured for the public good, the owner is entitled to due compensation. This riparian right is not a mere easement to pass over the water or a privilege to use the surface, but is property in the soil under the water. Upon it the owner may fasten or build structures, such as wharfs, piers or bulkheads, to the line of navigation. If any of these property rights are depreciated in value by reason of the construction and maintenance of bridges by others, the owner is entitled to recover damages therefor.
5. INSTRUCTIONS—*Ignoring Evidence—Directing Verdict.*—An instruction which ignores the evidence in a case and directs a verdict for the plaintiff is properly refused.

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6. INSTRUCTIONS—*Conflict—Read as a Whole—Damage to Land by Trespass—Uses in Near Future.*—In an action of trespass to recover damages done to the plaintiff by the defendant by erecting a bridge across a navigable stream, the plaintiff asked the court to instruct the jury that, in considering whether or not the bridge damaged the property of the plaintiff, they must consider any and all uses, not only to which the property had been put, but to which it might be put. The court added at the end of said instruction the words "in the reasonably near future." and as amended gave it, and this is held not to be to the prejudice of the plaintiff. The instruction, as amended and given, is not in conflict with an instruction given at the instance of the defendant, telling the jury that they must consider the value of the property immediately before and immediately after the construction of the bridge, by taking into consideration its uses, surroundings and capabilities, not only for the present, but for the reasonably near future. Instructions must be read as a whole.

Error to a judgment of the Circuit Court of Elizabeth City county in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

S. Gordon Cumming and *S. J. Dudley,* for the plaintiff in error.

Wm. C. L. Taliaferro, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This suit was brought by Sallie H. Peek to recover of the city of Hampton damages alleged to have been sustained by her as a result of the construction by the defendant city of a bridge across the waters of a navigable portion of Hampton creek.

It appears from the record that this bridge, with its approaches, is wholly within the corporate limits of the city

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of Hampton, and that the location of the bridge is opposite the residence and small farm property of the plaintiff, with the navigable waters of Hampton creek lying between the plaintiff's land and the bridge. The jury, after hearing the evidence and viewing the premises, both at high and low tide, under instructions as to the law of the case, found that the plaintiff had suffered no damage by reason of the construction of the bridge, and returned a verdict for the defendant city. To the final judgment of the circuit court sustaining that verdict this writ of error was awarded.

The evidence tends to show that the width of Hampton creek at the bridge is from fifteen to twenty feet and its navigable water little more than two feet deep at low tide, and that boats drawing more than two feet of water can only go above the bridge at high tide and must return before the tide recedes; that the plaintiff only owns one or two small row boats, drawing a few inches of water, and conducts no business of any kind; nor does it appear that there is any business conducted above the bridge on the shores of Hampton creek, parties living above the bridge only reaching their wharves in small boats. The creek makes a turn at the location of the bridge, which is on the opposite side of the creek from the plaintiff, thus leaving the entire width of the whole creek between her and the bridge, which gives her access to the navigable waters of Hampton creek, not only in front of her own premises, but for several hundred yards above the bridge, following the course of the creek, as far as it is navigable. It appears that the span at the center of the bridge is twenty feet wide, with an overhead clearance of from eight to ten feet, according to the condition of the tide. The bridge was built across this stream under authority of an act of the legislature. The expediency, therefore, of building the bridge is not an open question. *Plecker* v. *Rhoads*, 30 Gratt. (71 Va.) 795.

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The portion of Hampton creek in question having been declared navigable water by the United States authorities, the city of Hampton, as required by Federal statute, submitted its plans of the proposed bridge to the proper Federal authorities, and the entire question of navigation was gone into and the report on the whole matter was approved by the chief engineer of the government and the secretary of war.

The first ground of error assigned is that the bridge was built without legislative authority. It nowhere appears that this point was ever raised or relied on in the lower court. Indeed, the only reference to the subject in the record is an agreement of counsel found therein as follows: "It is agreed by counsel that the bridge complained of in this case was constructed by the city of Hampton under legal authority"; and in instruction "C," given at the request of the plaintiff, which tells the jury that the legal power of the city of Hampton to build the bridge in its present location is not an issue before them, but that the exercise of such legal authority did not exonerate the city from paying damages to the plaintiff if they believed from the evidence that she had suffered damages by reason of the construction of the bridge.

In view of this agreement of counsel and the instruction given at the instance of the plaintiff, upon which the case was tried, it is wholly out of place to contend in this court for the first time that the bridge was built without legal authority.

There is a general objection that the effect of the court's action in giving, refusing and modifying certain instructions was to eliminate from the consideration of the jury the question whether any property of the plaintiff was actually taken by the defendant city.

This is an action of trespass on the case to recover damages for an alleged trespass upon the riparian rights and

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privileges of the plaintiff, and not for the value of any property actually taken from her. There is no evidence that any property of the plaintiff was actually taken by the city in constructing the bridge, and it was clearly for this reason that the circuit court refused instructions based upon the theory that the plaintiff could recover in this case for the value of property actually taken. Instructions are properly refused unless there is some evidence tending to prove the facts upon which they are based.

Instruction "A" as given for the plaintiff told the jury that while the fee simple title to a riparian owner, such as the plaintiff, ends at low water mark, yet between that point and the line of navigability in Hampton creek she had a certain right known as a riparian right, which was valuable property, and when once vested the owner could not be deprived of it except for the public good, and if taken or injured for the public good the owner was entitled to due compensation. That this riparian right was not a mere easement to pass over the water or a privilege to use the surface, but that it was property in the soil under the water. That upon it the owner might fasten or build structures such as wharfs, piers or bulkheads to the line of navigation; and that if they believed from the evidence that any of these property rights had depreciated in value by reason of the construction and maintenance of the bridge in its present location, they must find for the plaintiff and assess her damages at such amount as they might deem proper in view of the evidence. There could scarcely have been given a clearer or more favorable statement of the plaintiff's riparian rights than is contained in the foregoing instruction.

Instruction "B" asked for by the plaintiff was properly refused. It ignored the evidence and peremptorily directed a verdict for the plaintiff. *Vaughan, &c., Co.* v. *Staunton T. Co.*, 106 Va. 445, 452, 56 S. E. 140.

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Objection is made to the court's modification of instruction "D," asked for by the plaintiff. That instruction, as asked, told the jury that in considering whether or not the bridge damaged the property of the plaintiff, they must consider any and all uses, not only to which the plaintiff's property had been put, but for which, but for the bridge, it might have been available, whether for residential, industrial or commercial purposes. The only change made in this instruction was to insert the words, "in the reasonably near future," making the instruction read, "any and all uses, not only to which the property had been put, but to which it might be put in the reasonably near future."

It is difficult to see how this modification of the instruction could have prejudiced the plaintiff. It enlarges her right of recovery beyond that claimed in the instruction as asked by her, and extends such right to the uses to which her property might be put in the reasonably near future. There is no conflict, as suggested, between this instruction, as amended, and the instructions granted on behalf of the city. Instructions must be read as a whole, and an examination of instruction six, granted on behalf of the city, shows that the jury are there told that they must consider the value of the property immediately before and immediately after the construction of the bridge by taking into consideration its uses, surroundings and capabilities, not only for the present but for the reasonably near future.

Instructions "E," "F" and "G," asked for by the plaintiff, were given without modification, except that there was eliminated from instruction "G" any inquiry as to the value of property actually taken, for the reason, as already seen, that there was no evidence upon which to base such an inquiry.

Objection is made to the instructions given on behalf of the defendant city. It is unnecessary to prolong this

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opinion by commenting upon these instructions in more detail than has been already done. It is sufficient to say that they have been carefully considered, and that it is apparent that no right of the plaintiff has been prejudiced by them.

The case was fairly submitted to the jury and the evidence abundantly supports their verdict. The judgment complained of must, therefore, be affirmed.

Affirmed.

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Richmond

REICHENSTEIN v. VIRGINIA RAILWAY AND POWER COMPANY.

January 15, 1914.

1. APPEAL AND ERROR—*Two Trials Below—Look to Evidence on First Trial.*—Where there have been two trials of an action, the statute requires this court to look first to the evidence on the first trial, and if the trial court erred in setting aside the verdict on that trial, to set aside all proceedings subsequently to that verdict, and to enter up judgment thereon.
2. APPEAL AND ERROR—*Two Trials Below—Refusal of Proper Instruction on First Trial—No Evidence at Second Trial.*—Where there have been two trials in the court below, and the record does not disclose on what ground the court set aside the first verdict, but does show that an instruction was asked for by the defendant, which should have been given, but was refused, which would of itself have been good ground for setting aside that verdict, and no evidence at all was offered on the second trial, and judgment was entered for the defendant, this court, on a writ of error, will affirm the judgment.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

S. M. Brandt, for the plaintiff in error.

Henry W. Anderson, W. H. Venable and *Andrew D. Christian,* for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

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This action was brought by the plaintiff in error against the defendant in error to recover damages for personal injuries sustained in collision with one of its street cars through the alleged negligence of the defendant. There were two trials in the court below. The jury at the first trial returned a verdict in favor of the plaintiff which the court set aside. At the second trial the case was submitted to the court and, no evidence having been offered, the court found for the defendant.

In this situation the rule of decision is that this court must look to the evidence on the first trial, and if the trial court erred in setting aside the verdict on that trial all subsequent proceedings will be annulled and judgment entered thereon. Acts 1891-2, p. 962.

The record does not inform us upon what ground the court set aside the verdict. In the view we take of the case it is not necessary to review the evidence. Yet it may be observed that leaving out of consideration the evidence of the defendant, the testimony of the plaintiff's witnesses on some of the essential points of the case was conflicting, confused and inherently unreliable.

However, without resting our decision on the insufficiency of the evidence as a whole, we are of opinion that the court erred in rejecting the prayer of the defendant for an instruction on the doctrine of concurrent negligence. The personal testimony of the plaintiff was sufficient to entitle the defendant to such an instruction.

The accident occurred about seven o'clock on the night of February 15, 1912, while the plaintiff was crossing Church street, in the city of Norfolk, about the center of a block, from west to east. Pipes had recently been laid in the street, and from a heavy rainfall the space between the eastern rail of the company's track and the sidewalk was filled with mud and water. When the plaintiff reached the eastern rail, she stopped to see how she might cross

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the intervening space to the sidewalk. She says: "I was not in a hurry to step for the sidewalk because there was a big lot of mud and water there." She also says she remained in that position two minutes. Whatever may have been the length of time, she stayed there until the collision occurred. It is true she claims to have kept a constant lookout for cars, and that she did not see the colliding car until it struck her; but that was a physical impossibility. Some of her witnesses testified that the lighted car could be seen two squares away. Hence, if she looked she must have seen the car and one step would have put her in a safe place; and if she did not look she was guilty of negligence. And that condition continued down to the moment of the impact which caused the injury.

In these circumstances the refusal of the trial court to give the instruction prayed for by the defendant would have justified its subsequent action in setting aside the verdict and ordering a new trial.

It follows from what has been said that the judgment complained of is without error and must be affirmed.

Affirmed.

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Syllabus.

Richmond

SHENANDOAH LIME COMPANY AND OTHERS v. GOVERNOR OF VIRGINIA AND OTHERS.

January 15, 1914.

1. CONSTITUTIONAL LAW—*Validity of Statute—Presumption.*—Every presumption is made in favor of the constitutionality of an act of the legislature. A reasonable doubt as to its constitutionality must be solved in favor of the validity of the law. The courts have nothing to do with the question whether or not it is wise and proper, as the legislature has plenary power except as restrained by the Constitution of the State or the United States, and it is only where a statute is plainly repugnant to a constitutional provision that the courts can declare it null and void.
2. STATUTES—*Construction—Motives of Legislature—When Unimportant.*—The motives, purposes and intentions of the legislature have no existence in law where its enactment is plain and unambiguous on its face, except as those motives may be disclosed on the face of the act itself. It is only where the true meaning of the language used in a statute is doubtful, or so obscure that the meaning of the legislature cannot be determined by giving the words used their ordinary and natural signification that resort can be had to the journals, or other extraneous sources of information, for aid in arriving at the true meaning of the language used in the statute.
3. CONSTITUTIONAL LAW—*Convict Lime Grinding Act—Validity—Dominant Purpose of Act—Incidental Purpose.*—It is apparent from the title, preamble and body of the "convict lime grinding act" that its dominant purpose is to provide suitable employment for certain long term or dangerous convicts confined in the penitentiary, and that the other provisions of the act are merely tributary to that end. The provisions of the act are clearly within the police power of the State, and do not conflict with the provisions of section 185 of the Constitution, which forbids the State becoming a party to or interested in "works of internal improvement," nor of section 188, forbidding the

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appropriation of public funds for private purposes, nor do such provisions amount to taking property of complainants without due process of law contrary to the fourteenth amendment of the Constitution of the United States.

4. CONSTITUTIONAL LAW—*Meaning of "Internal Improvements."*—The term "internal improvements" as used in the Constitution has acquired a definite and well recognized meaning in this State, and the framers of the Constitution must be presumed to have used it only in the definite sense that had attached to it throughout the history of the State. Its meanings as thus defined and understood throughout the legislation of the State, and the decisions of her courts, has included and had reference to the channels of trade and commerce, such as turnpikes, canals, railroads, telegraph lines, and, more recently, telephone lines, and other works of a like *quasi* public character. It was never intended to embrace such things as machinery for grinding lime by convicts and temporary structures to house them while so engaged.

5. CONSTITUTIONAL LAW—*Care of Convicts—Police Power.*—It is the duty of the State in its sovereign capacity to provide for the custody, employment and maintenance of its convicts, and to this end it is impelled not only by public expediency, but by motives of humanity. Such employment is necessary, not alone that they may earn their support, but also for their discipline, health and contentment. In discharging these duties the State is exercising its police power.

6. CONSTITUTIONAL LAW—*Police Power.*—The police power of the State is not paramount to the Constitution, but its free exercise is never interfered with unless plainly in conflict with the higher law.

7. CONSTITUTIONAL LAW—*Convict Lime Grinding Act—Governmental Purpose—Appropriation of Funds—Due Process.*—The "convict lime grinding act," being a valid exercise by the State of its police power, the appropriation which the act carries, in order to put it into effect and carry out its provisions, is clearly for a public purpose and not for a private purpose. The incidental provision for the sale of the product resulting from the employment of the convicts does not affect the governmental purpose of the act. Any injury to private manufacturers of lime that may result from the incidental competition is not the effect of any unlawful discrimination against them within the prohibition of the fourteenth amendment of the Federal Constitution, but is *damnum absque injuria.*

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Appeal from a decree of the Circuit Court of the city of Richmond. Decree for the defendants. Complainants appeal.

Affirmed.

The opinion states the case.

Braxton & Eggleston and *R. E. Byrd,* for the appellants.

A. E. Strode, Coke & Pickrell, C. V. Meredith, Wm. H. Mann, Jr., Samuel W. Williams, Attorney General, and *Richard B. Davis, Assistant Attorney General,* for the appellees.

HARRISON, J., delivered the opinion of the court.

This appeal involves the constitutionality of an act of the General Assembly of Virginia, known as the "Convict Lime Grinding Act," which was approved March 14, 1912, and is found in chapter 295 of the Acts of 1912, page 586.

In approaching this question, it is unnecessary to do more than cite the latest utterance of this court touching the principles by which it is governed in considering the constitutionality of a law, which is found in *Ex Parte Settle,* 114 Va. 715, 77 S. E. 496, where it is said: "The principles by which this court is governed in considering the constitutionality of a law have been too frequently the subject of judicial decision to require the citation of authority. Every presumption is made in favor of the constitutionality of an act of the legislature. A reasonable doubt as to its constitutionality must be solved in favor of the validity of the law, and the courts have nothing to do with the question whether or not the legislation is wise and proper, as the legislature has plenary power, except where the Constitution of the State or of the United States forbids, and it is only in cases where the statute in ques-

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tion is plainly repugnant to some provision of the Constitution that the courts can declare it to be null and void."

The bill in this case was filed by a number of Virginia corporations and firms engaged in the business of manufacturing agricultural lime, suing on behalf of themselves and all other taxpayers of the Commonwealth to enjoin the Governor of Virginia, the Superintendent of the Penitentiary and the Commissioner of Agriculture, who constitute the board appointed by the act mentioned, and the Auditor of Public Accounts and the State Treasurer, from carrying out the provisions of the act or expending any State funds to that end. From a decree of the circuit court dissolving a preliminary injunction that had been awarded and dismissing the complainants' bill this appeal has been taken.

In their bill of complaint and in their petition for an appeal, appellants assail this "Convict Lime Grinding Act" upon the ground that it violates article 185 of the Virginia Constitution, which forbids the State from becoming a party to or interested in any work of internal improvement, except public roads, or engaged in carrying on such work; it being further insisted that, if this position is not sustained, the act is obnoxious to article 188 of the Constitution because it appropriates public funds for a private purpose or business, and because it amounts to the taking of the property of the appellants without due process of law, contrary to the fourteenth amendment of the Federal Constitution.

The title of the act under consideration is: "An act to provide for the working of certain long term or desperate convicts by the Superintendent of the Penitentiary, the Governor and the Commissioner of Agriculture for the manufacture of ground limestone and oyster shells, and incidentally for the disposition of the same, and the by-

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products suitable for road construction, to the citizens of the State."

The preamble of the act is as follows: "Whereas, it is the policy of the State to work as many of the convicts confined in the penitentiary as possible for the building and maintenance of roads, and when on account of character or disposition it shall be expedient so to work them, to provide suitable employment in quarries, where they can be guarded and their product sold."

The body of the act carries out the purpose expressed in its title and preamble. It directs that the convicts be put to work grinding oyster shells and limestone rock, provides the material upon which they are to work and the instrumentalities with which they are to do the work, and further provides for the sale of the product of their labor and for their support and keep from the proceeds. The act appropriates $30,000 for the purpose of carrying its objects into effect, and provides that the ground limestone and oyster shells shall be sold for cash and at a price which shall repay the State for the maintenance, guarding and service of the convicts, for interest on the amount invested in machinery, the upkeep of the machinery, the cost of the rock, shells, etc.; and further provides that the board appointed by the act shall dispose of any by-product of the quarry or oyster shells for road or other purposes to any of the citizens of this State for a fair price, and other details not necessary to be mentioned.

It is apparent from the title, preamble and the body of this act that its dominant purpose is to provide suitable employment for certain long term or dangerous convicts confined in the penitentiary, and that the other provisions of the act are merely tributary to that end. This is practically conceded in clause seven of appellants' original bill of complaint. Appellants, however, do not rest their case alone upon the act as it was actually passed, but insist

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that the Governor's message, the entries on the House Journal and the original draft of the act contradict the avowed purpose of the act as passed, and show that the real motive of the legislature was to embark the State in private business in competition with appellants and other private manufacturers, so as to enable it to furnish cheap ground lime to farmers at the expense of the public treasury.

Without expressing any opinion upon the merits of the contention that the matters relied on outside of the act show a different intention from that expressed on the face of the law that was enacted, it is sufficient to say that the motives, purposes or intention of the legislature have no existence in law where its enactment is plain and unambigious on its face, except as those motives may be disclosed on the face of the act itself. It is only where the true meaning of the language used in a statute is doubtful or so obscure that the meaning of the legislature cannot be determined by giving the words used their ordinary and natural signification, that resort can be had to the journals or other extraneous sources of information for aid in arriving at the true meaning of the language used in the statute.

In 36 Cyc. pp. 1137-8, the law is thus stated: "The intention of the legislature, to which effect must be given, is that expressed in the statute, and the courts will not inquire into the motives which influenced the legislature or individual members, in voting for its passage; nor indeed as to the intention of the draftsman, or of the legislature, so far as it has not been expressed in the act."

In *Soon Hing* v. *Crowley,* 113 U. S. 703, 710, 5 Sup. Ct. 730, 734, 28 L. Ed. 1145, Mr. Justice Field, speaking for the Supreme Court says: "And the rule is general with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legisla-

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tors in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments."

The effect of the contention under consideration is that the legislature had adroitly conceived and passed the act in question in a valid form, by suppressing or concealing some supposed unconstitutional motive or purpose which it wished to subserve by the legislation. There is nothing in the record to warrant this suggestion, but if there was it would not avail appellants.

In Cooley on Constitutional Limitations (7th ed.), p. 258, it is said: "And although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegation were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered into."

We are of opinion that the machinery for grinding oyster shells and limestone rock, and the temporary structures for housing the convicts pending the work contemplated by the act in question, do not come within the meaning of the term "internal improvements," as that term is used in article 185 of the Constitution. Whatever interpretation that term may have elsewhere, it has no such meaning in Virginia, where for nearly if not quite one hundred years it has acquired a definite and well recognized meaning. Each of our Codes, beginning with that of 1819, to and including the Code of 1887, have had chapters entitled "Works of Internal Improvement." In using this term in article 185, the late Constitutional Convention must be

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presumed, according to established rules of construction, to have used the term only in the definite sense and meaning that had attached to it throughout the history of the State. Its meaning as thus defined and understood throughout the legislation of the State, and the decisions of her courts, has included and had reference to the channels of trade and commerce, such as turnpikes, canals, railroads, telegraph lines, including in more recent years telephone lines, and other works of a like *quasi* public character. In the past these works, designated as "works of internal improvement," were sometimes constructed and operated by the State, but generally by corporations composed of private individuals, which, because of the public character of their works, always enjoyed the power of eminent domain, owed duties to the public and were subject to State regulation. These corporations, because of the great need of such improvements at the time, and the difficulty attending the construction of such works, were generally encouraged by State aid, and it was not until the Constitution of 1869 that the State was inhibited from becoming a party to or interested in such works of internal improvement.

The cheap structures used for grinding limestone rock and oyster shells have no element of permanency about them and may be moved from place to place as the necessity arises. The terms "internal improvements," as used in the Constitution, was never intended to include such work. To thus broaden the long accepted meaning of that term in Virginia would deprive the State of its police power, as well as the exercise of its necessary governmental functions. The manifestly dominant purpose of the act being, as already seen, to provide employment for convicts who could not be used in the usual employments under existing statutes, there can be no question that the State is acting within its police power in providing the present means for

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employing such convicts. It is the duty of the State in its sovereign capacity to provide for the custody, employment and maintenance of its convicts, and to this end it is impelled not only by public expediency but by motives of humanity. Such employment is necessary, not alone that they may earn their support, but also for their discipline, health and contentment.

An examination of the authorities shows that the courts, generally, are indisposed to suffer the police power to be impaired or defeated by constitutional limitations.

In *Barbier* v. *Connolly,* 113 U. S. 27, 31, 5 Sup. Ct. 357, 359 (28 L. Ed. 923), Mr. Justice Field, in speaking of the effect of the Fourteenth Amendment of the Federal Constitution upon exercises by a State of its police power, says: "But neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

The dispensary laws which have been enacted in a number of States and upheld by the courts are instructive illustrations of the extent to which the sovereign may go in the exercise of its police powers. *State* v. *Aiken,* 62 S. C. 222, 20 S. E. 221, 26 L. R. A. 345; *Farmville* v. *Walker,* 101 Va. 323, 43 S. E. 558, 61 L. R. A. 125, 99 Am. St. Rep. 870; *Mugler* v. *Kansas,* 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.

In commenting upon the laws prohibiting the sale and manufacture of liquors, Judge Cooley says: "Perhaps there is no instance in which the power of the legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more

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striking light than in the case of these statutes. The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the legislature then steps in, and by an enactment based on general reasons of public utility, annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand. Even the keeping of that for the purposes of sale becomes a criminal offence; and, without any change whatever in his own conduct or employment, the merchant of yesterday becomes the criminal of to-day, and the very building in which he lives and conducts the business which to that moment was lawful becomes the subject of legal proceedings, if the statute shall so declare, and liable to be proceeded against for a forfeiture. A statute which can do this must be justified upon the highest reasons of public benefit; but, whether satisfactory or not, the reasons address themselves exclusively to the legislative wisdom." Cooley's Constitutional Limitations, p. 850.

The police power of the State is not paramount to the Constitution, but its free exercise is never interfered with unless plainly in conflict with the higher law. *Noble* v. *State Bank,* 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062; *N. & W. R. Co.* v. *Com'th,* 93 Va. 749, 24 S. E. 837, 34 L. R. A. 105, 57 Am. St. Rep. 827.

In the case at bar we are warranted, upon abundant authority, in holding that the exercise by the State of its police power, in enacting the "Convict Lime Grinding Act" under consideration, cannot be defeated because of any conflict with article 185 of the Constitution.

We are further of opinion that the act does not violate article 188 of the Virginia Constitution. It does not, as contended, appropriate public funds for a private purpose; nor does it amount to the taking of the property of complainants without due process of law, contrary to the Fourteenth Amendment of the Federal Constitution. It

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being the purpose of the act to furnish employment to convicts, as appears from the act itself, and that purpose being, as already seen, a valid exercise by the State of its police power, the appropriation which the act carries is clearly for a public purpose and not for a private purpose. The manner in which the State shall discharge the duty of providing for its convicts must be vested in the discretion of the legislature. In the exercise of this discretion, the legislature can provide employment, and there is no constitutional inhibition upon its convicts being put to grinding oyster shells and limestone rock, as provided in the present act, if such a course is deemed expedient. An act having this object has a public or governmental purpose, and the incidental provision for the sale of the product resulting from such employment of its convicts does not affect such governmental purpose. The necessary consequence of the public or governmental purpose of such an act is the appropriation of public funds to carry the act into effect, and such an appropriation is not unconstitutional. Any injury to the private manufacturers of lime that may result from the incidental competition is not the effect of any unlawful discrimination against them within the prohibition of the Fourteenth Amendment to the Federal Constitution, but is *damnum absque injuria.*

It would prolong this opinion to a wholly useless extent to attempt to comment in detail upon all the authorities cited by learned counsel. Those relied on by the appellants have been given due consideration and they have been found not to impair the conclusion reached, that the act here assailed is not repugnant to either the State or the Federal Constitution. The decree of the circuit court so holding is plainly right and must be affirmed.

Affirmed.

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Syllabus.

Richmond

SOUTHERN RAILWAY COMPANY v. GRUBBS.

January 15, 1914.

1. MASTER AND SERVANT—*Tort of Servant—Damages—Compensation—Punishment.*—The master is liable to make *compensation* for injuries done by his servant, within the scope of his employment, although not previously authorized nor subsequently ratified by the master, but he cannot be held for exemplary or punitive damages merely by reason of wanton, oppressive or malicious intent on the part of his servant. In order to subject the master to *punitive* damages for the act of his servant, the act must have been previously authorized or subsequently ratified by the master.
2. MASTER AND SERVANT—*Tort of Servant—Failure to Discharge—Ratification.*—The mere failure of the master to discharge his servant after the commission of a wrongful act by the servant does not constitute a ratification of such act.
3. INSTRUCTIONS—*Read as a Whole—Different Theories of Case.*—Instructions are to be read as a whole, and if, when this is done, it is seen that the defendant's theory of the case was correctly and strongly presented, it is not error to give an instruction presenting the plaintiff's theory of the case.
4. CARRIERS—*Assault on Passenger—Damages—Limit—Case at Bar.*—In an action by a passenger against a railroad company to recover damages for an assault committed by the conductor on a passenger, where the damages are laid in the declaration at $10,000, it is not error to instruct the jury that, in assessing the damages of the plaintiff, they shall "assess his damages at such sum as will compensate him for such physical injuries and mental sufferings, if any, as were occasioned by such assault, not exceeding the sum of $10,000 claimed in the declaration." The instruction is not amenable to the objection that it gave the jury to understand that there was no limit to the amount they might award except the $10,000 claimed in the declaration.
5. CARRIERS—*Railroad Conductor—Conservator of Peace—Object of Section 1294-d (45) of Code.*—Section 1294-d, paragraph 45, of the Code, which constitutes the conductor of a railroad train a peace officer of the State, was never intended to release common

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carriers from the high and important duty resting upon them to diligently care for and protect their passengers. Its object was to increase their facility for affording the traveling public protection by making their conductors conservators of the peace.

6. CARRIERS—*Railroad Conductor—Functions—Peace Officer—When So Acting—Question for Jury.*—The functions of a conductor of a railroad train are primarily as a representative of the railroad company, and his duty to the passenger is the same as that of the company. His duties as conservator of the peace are merely incidental to his office of conductor. Neither he nor his company can make use of his incidental functions as a conservator of the peace as a pretext to shield themselves from liability for his wrongful and oppressive acts as conductor. Whether or not, in a given case, the conductor was, in fact and in good faith, acting in the capacity of conservator of the peace, and not in his capacity of conductor, is a question for the jury under all the facts and circumstances of the case, and if it is relied on to shield the company from liability the company must show the necessity and good faith of the transaction.

7. CARRIERS—*Passenger—Ceasing to Be Passenger—Assault by Conductor—Question for Jury.*—Whether or not a passenger who fails to pay a small extra sum demanded of him because he had not purchased a ticket has lost his rights as a passenger, and whether the conductor was justified in making a violent and injurious assault upon him, are questions for the jury to determine, upon all the facts and circumstances of the case, under proper instructions from the court.

Error to a judgment of the Circuit Court of Campbell county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Coleman, Easley & Coleman, for the plaintiff in error.

Don Halsey and *Volney E. Howard,* for the defendant in error.

HARRISON, J., delivered the opinion of the court.

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This action of trespass on the case was brought by William T. Grubbs to recover of the Southern Railway Company damages for injuries alleged to have been sustained by him while a passenger on one of the defendant's trains. There was a verdict and judgment for the plaintiff to which this writ of error was awarded.

It appears that the plaintiff boarded the defendant's passenger train at Altavista, his destination being Lynchburg. While ordinarily the conductor of a train takes up tickets and collects fares, it appears that on this train another employee, designated as a "ticket collector," was solely charged with that duty. It further appears that when approached by the ticket collector, the plaintiff handed him sixty-five cents, the price of a ticket from Altavista to Lynchburg. Thereupon the collector told the plaintiff that he would have to pay ten cents additional as he had no ticket, for which he would give him a "draw back ticket" redeemable at any station or ticket agency of the company on presentation. The plaintiff refused to pay the additional ten cents, claiming that the ticket window at Altavista where he boarded the train was closed, that he could not get a ticket, and that he could pay no more.

The evidence tends to show that the plaintiff became excited and noisy, and that the ticket collector desisted and called the conductor. The evidence of the plaintiff tends to show that immediately upon the arrival of the conductor, he violently assaulted the plaintiff, striking him in the face and choking him, and after vilely abusing him and insulting him, threw him across the arm of the seat and injured his back. The evidence as to the plaintiff's conduct and also as to that of the conductor is conflicting, and no attempt has been made to do more than state it sufficiently to show the character of the case which was submitted to the jury.

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The first assignment of error is that the court erred in giving for the plaintiff the sixth instruction, which is as follows:

"The court instructs the jury that if they shall find for the plaintiff, in ascertaining the damages they should take into consideration the bodily harm, humiliation and mental distress, if any, which may have been suffered by the plaintiff, and they should award him such damages as they shall deem proper compensation therefor, and in arriving at the sum to be awarded they may take into consideration whether or not the said injuries were wantonly inflicted."

The latter part of this instruction very plainly told the jury that they might award punitive or exemplary damages. The language, "and in arriving at the sum to be awarded they may take into consideration whether or not the said injuries were wantonly inflicted," would be meaningless unless it was intended to authorize the ascertainment of vindictive damages. There is no evidence that the conduct of the conductor in this case was authorized, or that it was ratified or approved by the defendant company.

In the case of *N. & W. Ry. Co.* v. *Neely,* 91 Va. 539, 22 S. E. 367, it is said that while a master is liable, to the extent of compensatory damages, for the unlawful act of his agent committed in the course of his employment, whether ratified or not, that in order to recover punitive damages of the master for the tortious act of the servant, ratification by the master must be shown. And in the case of *Sun Life Ins. Co.* v. *Bailey,* 101 Va. 443, 44 S. E. 692, it is held that in an action against a corporation to recover damages for the publication by its agent of a libel, if the publication was not previously authorized or subsequently ratified by the defendant, the plaintiff could recover only actual or compensatory damages; citing among other cases, *Lake Shore, &c., Co.* v. *Prentice,* 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, wherein Mr. Justice Gray, delivering the

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opinion of the court, said: "In this court, the doctrine is well settled, that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirt of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages." "Examplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent, within the scope of his employment, cannot be held for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent."

In *N. & W. R. Co.* v. *Lipscomb,* 90 Va. 137, 17 S. E. 809, 20 L. R. A. 817, this court quoted as follows from *Hogan* v. *Providence R. Co.,* 3 R. I. 88-91, 62 Am. Pr. 377, cited also in 147 U. S., 13 Sup. Ct., 37 L. Ed., as follows: "We do not see how such damages can be allowed, when the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him *particeps criminis* of the agent's act.

"No man should be punished for that of which he is not guilty. When the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant."

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The plaintiff relies upon the failure of the defendant company to discharge the conductor, before trial, as a ratification of the conductor's alleged wrongful act. This position is not tenable.

As said in *Toledo R. Co.* v. *Gordon,* 143 Fed. 95, 74 C. C. A. 289, "It would indeed be a harsh rule—harsh in its effect on all employees—that would hold a railroad company to have ratified the employee's act merely because before trial the employee was not discharged; such a rule would put their continued employment in jeopardy every time an accident occurred, not because the employee was shown to have been guilty of wanton conduct, but because the railway company stood in danger that wantonness might be established."

In the light of the authorities cited we are of opinion that the plaintiff's sixth instruction was erroneous and should not have been given.

The second assignment of error is to the action of the court in giving the plaintiff's fourth instruction.

In brief, this instruction told the jury that if they believed from the evidence that the plaintiff was violently assaulted and choked by the conductor only because he refused and failed to pay full fare and without doing anything to justify the assault, they must find for the plaintiff and assess his damages at such sum as will compensate him for such physical injuries and mental sufferings, if any, as were occasioned by such assault, not exceeding the sum of $10,000 claimed in the declaration.

This instruction does not, as contended, unduly emphasize the plaintiff's theory of the case. Instructions must be read as a whole. When this is done, it is seen that the defendant's theory of the case was correctly and strongly presented in a number of instructions given for both the plaintiff and the defendant, so that the defendant could not have been prejudiced by the form of this instruction.

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Nor is there any merit in the contention that the last clause of the instruction gave the jury to understand that there was no limit to the damage they might award except the $10,000 claimed in the declaration. On the contrary, the jury were expressly limited in their ascertainment of damages, if they believed the plaintiff was entitled to recover, to *such sum as would compensate him for such physical injuries and mental sufferings as were occasioned by the assault.* The reference to the damage claimed in the declaration was merely to inform the jury that in no event could they exceed that limit.

The third assignment of error is to the action of the court in refusing certain instructions asked for by the defendant company.

Instruction No. 1 asked for by the defendant is very involved and difficult to understand. Its purpose seems to be to peremptorily tell the jury that they must find for the defendant, because there was no evidence that the conductor, or the ticket collector and baggagemaster, who were called by the conductor to his assistance, were acting within the scope of their employment or in the line of duty conferred upon them at the time the alleged wrongs were inflicted upon the plaintiff.

The effect of this instruction is to announce the doctrine that a carrier of passengers cannot be held liable for compensatory damages to a passenger who has been maltreated by its officials in charge of its train, unless he proves that such employees were previously authorized by the defendant to commit the wrong complained of, or that their conduct was subsequently ratified. The contrary is abundantly shown to be the law by the authorities already cited.

No comment upon instruction No. 2, asked for by the defendant, is necessary further than to say that it is amenable to the same objection pointed out with respect to No. 1, and was therefore properly refused. In support

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of these instructions the defendant relies upon the Code, section 1294-d, par. 45, which constitutes the conductor a peace officer of the State, and insists that the only authority the conductor has with reference to passengers is derived from that statute, and, therefore, that the conductor is not an officer of the company at all, but an officer of the State; that being an officer of the State, the defendant company is not responsible for his conduct, and cannot be held liable upon any supposed duty of protection that it owed the plaintiff.

It is sufficient to say that the statute mentioned was never intended to release common carriers from the high and important duty resting upon them to diligently care for and protect their passengers. Its object was to increase their facility for affording the traveling public protection by making their conductors conservators of the peace. *Gillingham* v. *Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. Rep. 827.

No objection is assigned to the court's refusal to give instruction No. 3. This instruction was clearly unsound and, therefore, properly rejected.

Instructions Nos. 4 and 7 relate to the same subject and will be considered together. No. 4, in effect, told the jury that the conductor could alone determine in what capacity he acted in making the alleged assault on the plaintiff, whether as conductor or conservator of the peace, and that he having testified that he acted in his character as conservator of the peace, without countervailing evidence, they must find for the defendant; the *prima facie* presumption of the law being that the conductor did act in his capacity as a conservator of the peace. By instruction No. 7 the jury were told not only that a conductor was a conservator of the peace, but that the defendant company was not liable for any act of his, as such, even though he exceeded his authority and his act was unlawful.

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The effect of these instructions was to make the mere claim of the conductor that he was acting as a conservator of the peace conclusive of the case, as a presumption of law, without regard to whether the facts and circumstances of the case justified his course of conduct. In other words, the contention is that being a corservator of the peace he is thereby taken out of the control of the company, and out of the sphere of the company's responsibility for his acts, provided he chooses to assume to act under the guise of a conservator of the peace, without any reference to the question whether or not he was, in good faith, justified in assuming that role.

The functions of a conductor are primarily as a representative of a railroad company, and his duty to the passenger is the same as that of the company. His duties as a conservator of the peace are merely incidental to his office of conductor. Neither he nor his company can make use of his incidental functions as a conservator of the peace as a pretext to shield themselves from liability for his wrongful and oppressive acts as conductor. The instructions under consideration would afford railroad companies a ready means of escape from all responsibility to passengers who were wrongfully maltreated by conductors. It is a question for the jury to determine, upon all the facts and circumstances of the case, whether or not the conductor was, in fact and in good faith, acting in the capacity of a conservator of the peace, and not in his capacity of conductor; and if it is relied on to shield the company from liability, the company must show the necessity and good faith of the transaction. It follows from what has been said that these two instructions were properly refused.

Instructions 5, 6, 10 and 11, which were properly refused, cover the same ground and will be briefly considered together. By each of these instructions the jury

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was, in effect, told that the plaintiff was not a passenger at all but a trespasser. They are all based upon the isolated fact that the plaintiff did not pay without protest the additional ten cents that was demanded of him by the ticket collector. They each ignore the conceded fact that the plaintiff paid sixty-five cents, the price of a ticket from Altavista to his destination, which the collector received and kept, and wholly disregard all the other evidence in the case which tends to show that when the plaintiff arrived at the station the ticket office was closed so that he could not buy a ticket, and that he had no more money than the sixty-five cents and was, therefore, powerless to pay the additional ten cents. The instructions rest alone upon the bare fact that the plaintiff failed to pay the ten cents and thereby lost his rights as a passenger, and justified his immediate arrest by the conductor as a wrongdoer. It was the province of the jury to determine, upon all the facts and circumstances shown of record, and under proper instructions, whether or not the plaintiff was a passenger, and whether, under all the circumstances, the conductor was justified in the violent and injurious assault he is alleged to have made upon him.

For the error of the court in giving instruction six for the plaintiff, which authorizes the jury to assess the defendant company with punitive damages, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial, not in conflict with the views expressed in this opinion.

Reversed.

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Richmond

WILKES' ADMINISTRATOR v. WILKES.

January 15, 1914.

1. EVIDENCE—*Survivor of Transaction—Will as a Matter of Transaction.*—A will is the sole act of the testator, and its execution is not such a contract, matter or transaction as comes within the purview of section 3346 of the Code excluding the survivor of a contract or other transaction from testifying. A widow, therefore, is not excluded by said section from testifying as to the execution of the will of her late husband.
2. EVIDENCE—*Husband and Wife—Privileged Communications—Wills.*—Under the provisions of section 3346-a of the Code, neither husband nor wife can, without the consent of the other, be examined in any case as to *any communication* made by the one to the other while married, nor can such communication be revealed, without such consent, after the marriage relation ceases. The statute is founded on public policy and applies to "any communication" between them, of any nature, whether confidential or not, and it is immaterial by whom or for what purpose the husband or wife may be called as a witness, nor whether for or against each other. Conversations, therefore, between a husband and his wife as to the making of his will cannot be given in evidence by his widow, no matter by whom she is called as a witness.
3. WILLS—*Erasures—Presumption.*—An erasure of words in a holograph will is presumed to have been made by the testator, in the absence of proof to the contrary.
4. APPEAL AND ERROR—*Verdicts—Receiving Improper Testimony—When Harmless.*—The error of the trial court in improperly receiving evidence is harmless, where the verdict of the jury is supported by other sufficient evidence and was approved by the trial court.

Appeal from a decree of the Corporation Court of the city of Staunton. Decree for some of the defendants. One of the defendants appeals.

Affirmed.

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The opinion states the case.

Bumgardner & Bumgardner, for the appellant.

Landes & East, S. V. Kemp, H. D. Flood, F. C. Moon and *Edward H. Moon,* for the appellees.

CARDWELL, J., delivered the opinion of the court.

S. M. Wilkes, of Staunton, Va., departed this life on the 9th day of May, 1910, seized and possessed of considerable real and personal estate, leaving to survive him his widow, Nannie M. Wilkes, and as his only heir at law a son, Birl C. Wilkes, over the age of twenty-one years but of unsound mind. On May 28, 1910, a paper writing bearing date of the 11th day of March, 1910, purporting to be a holograph will left by the decedent, was produced in the corporation court of the city of Staunton by Nannie M. Wilkes, his widow, and the executrix named therein to act along with W. L. Brown, named as executor, and this paper was, in an *ex parte* proceeding, probated as the will of the decedent, and letters of administration granted to the executrix and executor therein named.

The whole of this testamentary paper, including the signature of the testator affixed thereto, was written with pencil and there appeared a line drawn through the clause reading as follows: "& finds it necessary;" and in the *ex parte* probate proceeding the will was admitted to record omitting said clause.

The paragraph of the will in which these words appeared, so far as it needs to be repeated here, reads as follows: "I desire that the said Mrs. Nannie M. Wilkes shall have in fee simple the residence . . . the store on Main street . . . together with the building adjoining . . . and in addition to this she is to have the rents from any

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other properties I may own so long as she may live & finds it necessary (the words "& finds it necessary" having a single line with pencil indistinctly and irregularly drawn through them) for the support of herself and our afflicted son, Birl C. Wilkes . . ." This is an outline of my wishes, and if I should die before it is properly written or copied I want to be understood as my wishes in the matter, as Mrs. Wilkes and I have talked the matter over and fully agreed that the residence and Main st. property of Staunton, Va., above mentioned she willingly accepts as her one-third interest in my entire estate. . . ."

The collateral kin of the decedent, who are also beneficiaries under the paper writing purporting to be his will, instituted this suit under section 2544 of the Code, in which W. L. Brown, as executor, united, the bill charging that the words in question, "& finds it necessary," omitted from the said paper when recorded, were a part thereof and prayed an issue *devisavit vel non* for the purpose of having judicially determined whether or not any part of said paper, and if any, how much, be the will of said S. M. Wilkes, deceased.

Nannie M. Wilkes, the widow, in her own right and as executrix, answered the bill, and Birl C. Wilkes, the son, being of unsound mind, answered by A. S. Robertson, his guardian *ad litem,* and also as his committee, a former answer theretofore filed by his mother as his committee having been by leave of court withdrawn. The answer last filed for Birl C. Wilkes challenged the validity of the supposed testamentary paper, and asserted his right to the entire estate, subject only to the dower rights of his mother in the lands and her distributive interest in the personal estate, as sole child and heir at law of the decedent.

An order was entered in the cause making up and submitting the issue to a jury, duly empaneled to try the same, viz: "Whether the paper in question was in fact the true

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last will and testament of S. M. Wilkes, deceased, and if so, were the words '& finds it necessary,' through which the line was drawn, a part of the same?"

The case was heard on oral testimony, depositions and documentary evidence, and the court having instructed the jury as to the law of the case, they rendered their verdict finding that said paper was the true last will of the decedent, but that the clause, "& finds it necessary," was no part thereof; whereupon the court entered its final order on May 4, 1912, approving the finding of the jury, probating the paper as the will of S. M. Wilkes, deceased, excepting and excluding the clause, "& finds it necessary."

Subsequent to the rendition of this final order, Birl C. Wilkes departed this life intestate, leaving to survive him his mother, Mrs. Nannie M. Wilkes, his only heir at law; and W. H. Hyer having qualified as administrator d. b. n. of his estate, applied for and obtained this appeal.

In the petition for the appeal there are a number of assignments of error relating, respectively, to the granting or refusal of instructions, and the refusal of the court to set aside the verdict of the jury on the ground that it is contrary to the law and the evidence; but the only question discussed in the petition or in the oral argument is whether or not the will in question is valid as a holograph will. Appellees, other than Nannie M. Wilkes, who are collateral kin of the testator and beneficiaries under his will, assign as cross-error the rulings of the trial court (1) in admitting certain testimony; (2) in giving over the objection of appellees certain instructions asked for by Nannie M. Wilkes; and (3) in overruling the objections of appellees to the competency of Nannie M. Wilkes to testify in this cause.

In the view we take of the case, it is not necessary to consider the errors assigned *seriatim*. The contest in the lower court was a three-sided one, the widow, Nannie M.

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Wilkes, supporting the will, but insisting that the clause therein restricting her income from property not devised to her in fee simple was not a part of the will; the collateral kin, who are the residuary legatees, contending that there had never been a valid cancellation of the words, "& finds it necessary," and that those words remained a part of the will, thereby restricting the income to the widow and enlarging the provision made for them; and on behalf of the son, Birl C. Wilkes, it was contended by his committee and guardian *ad litem,* that the act of striking out these words, done by the hand of another and not that of the testator in the course of the preparation of the paper, was such as to destroy the holographic character of the will and produce intestacy.

The extended and learned argument of counsel for appellant that the act of striking out the words "& finds it necessary," in the testamentary writing in question was an act that destroyed the holographic character of the paper as a will and produced intestacy, proceeds upon the theory that Mrs. Wilkes was a competent witness to testify in this proceeding that she and not her husband, the testator, drew the line through said words. Her statement in substance is that her husband was preparing his will in their room and in her presence, and that before he completed the same, he handed the paper to her and asked her to read it and see if it suited her; that she took the paper, read it while he was temporarily out of the room, and when he returned he asked her how it suited her; that her reply was, in substance, that it was all right with the exception of the words "& finds it necessary," "and I have run the pencil through these words and struck them out;" or that she then took a pencil and with his sanction and by his direction herself drew a horizontal line through the words "& finds it necessary," and that the testator subsequently, with his own hand, completed the draft of the paper, signed it, and put it away.

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The competency of Mrs. Wilkes as a witness was objected to on two grounds: (1) "That she was a party to the contract, matter and transaction which is the subject of investigation in this suit, and that as her husband, the other party thereto, was dead, she was incompetent to testify under section 3346-a of the Virginia Code;" (2) that the testimony which she was called upon to give consisted of communications made to her by Mr. Wilkes, her husband, and by her to him during coverture, and, therefore, under sub-section 3 of section 3346-a, she was incompetent to testify in this cause.

The trial court overruled the objection to Mrs. Wilkes as a witness, and she was allowed to testify, as above stated, to which ruling appellees duly excepted.

With respect to the first ground of objection to Mrs. Wilkes as a witness, we deem it only necessary to say that it has been recognized as a settled rule of law since the case of *Martz* v. *Martz*, 25 Gratt. (66 Va.) 361, that a will is the sole act of the testator and its execution is not such a contract or transaction as comes within the purview of the statute, now section 3346 of the Code, which is invoked to sustain the right to introduce Mrs. Wilkes as a witness adverse to the interest of Birl C. Wilkes. That statute has no application whatever to the case in judgment. Section 3346-a, which applied to and determined the competency of husband and wife as witnesses for or against each other, formerly used the words, "contract or other transaction which is the subject of investigation," while as the section now appears in the Code the words, "contract, *matter* or transaction which is the subject of investigation," are used; but this change in the statute, adding the word "matter," does not impair the force and effect of the decision in *Martz* v. *Martz, supra,* and therefore has no material bearing upon the issue in this case. The competency of Mrs. Wilkes to testify in the case is to be deter-

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mined by sub-division 3 of section 3346-a, which provides: "Neither husband nor wife shall, without the consent of the other, be examined in any case as to any communication made by the one to the other while married, nor shall either of them be permitted to reveal in testimony after the marriage relations cease any such communication made while the marriage subsisted."

The language of the statute is as broad and comprehensive as could have been used to express the intent of the framers thereof. It is founded on public policy and applies to "any communication" between husband and wife, no matter what its nature, whether confidential or not, its language being that neither husband nor wife shall, without the consent of the other, be examined *in any case* as to *any communication* made by the one to the other, and it would, therefore, seem too clear to admit of argument, that it is a matter of no consequence by whom the husband or the wife may be called as a witness or for what purpose, whether for or against each other.

The will of S. M. Wilkes, deceased, had been previously probated in *ex parte* proceedings on the motion of Mrs. Wilkes, but there was raised a question whether the words "and finds it necessary" were a part of the will as probated or not, and it was to determine that question, and for that purpose alone, that this suit was instituted.

Mrs. Wilkes' and Birl Wilkes' representatives both contended that those words had in fact been cancelled by the hand of Mrs. Wilkes and not by the testator himself, but by his consent before the execution of the will, and were not in fact a part thereof; it being further contended on behalf of Birl Wilkes that if such were the fact, then in law the will was not valid as a holograph will; while the collateral kin and beneficiaries contended that those words were not cancelled, but remained a part of the will.

At common law, Mrs. Wilkes would have been plainly incompetent as a witness in the case, as husband and

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wife were absolutely incompetent to testify for or against each other, and it is only by statute that this incompetency has been partially removed. In other States this incompetency or disability has been removed as to confidential communications, but our statute removing the disability excepts from its operation "any communication," and does not limit the exception to "confidential communications."

The facts testified to by Mrs. Wilkes, to prove which she was called as a witness, are communications which she says were made to her by her husband in respect to his will, which he was then drafting, or as to communications she made to him with reference to his will, or as to communications had between them as to the making of his will, etc. If these communications are not within the purview and meaning of the statute, it would be difficult indeed to determine where the line of demarcation is to be drawn. When the statute says "any" (which includes all) "communications" are excluded, unless this plain language and undoubted meaning of the statute is to be ignored, Mrs. Wilkes must be excluded as a witness in the case. We have here a case in which the witness derived her knowledge of the facts as to which she was called to testify from her relations to the testator. It cannot be conceived that such a topic, with respect to which she was called to and did testify, would have been the subject of discussion but for the existence of such relations between the parties. The purpose of the introduction of Mrs. Wilkes was to prove facts communicated to her by her husband with respect to the disposition of his property by will, which, if proven, would enlarge her interest in his estate and lessen that of the collateral kin named as remaindermen. This is not all: to admit her testimony as to communications between her and her husband concerning the disposition of his property by will

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lays the only foundation for the contention that is made on this appeal—that S. M. Wilkes died intestate, and therefore his whole estate descended to his insane son and only child, upon whose death the same would become the property of the witness, Mrs. Wilkes, and that, too, in face of the fact that the will of the husband states that upon a discussion of the matter between him and his wife she was satisfied with the provision he had made for her.

In *Yeppla* v. *Minn. Tribune Co.*, 35 Minn. 310, 29 N. W. 127, the court in construing General Statute C-73, sec. 10, which provided that "neither husband nor wife can during marriage or afterwards be, without the consent of the other, examined as to any communication made by the one to the other during marriage," held that "this includes all private conversations between husband and wife, though on subjects not confidential in their nature."

The reason for the rule fixed by the statute is very clearly stated in the early case of *Robin and Others* v. *King*, 2 Leigh (29 Va.) 140, where the wife was held not to be competent to testify as to statements she heard her husband make in the presence of the family with no request to keep them secret, and even though the husband was not a party to the suit and though the husband was dead. In the opinion of the court it is said: "It is well settled that husband and wife cannot be witnesses for each other, because their interests are identical, nor against each other, for fear of creating distrust and sowing dissensions between them, and perhaps occasioning perjury. . . . It would also violate that confidence which from the nature of the relation ought to be regarded as sacred, and would be arming each of the parties with the means of offense, which might be used for very dangerous purposes. So important is this rule that the law will not suffer it to be broken by agreement; for in *Barker* v. *Dixie*, Rep. Temp. Hardw. 264, Lord Hardwick would not suffer a wife

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to be examined against her husband, though he consented that she might.

"And this rule is adhered to, though the marriage tie be dissolved by the death of one of the parties, or by divorce. (Citing cases.) It is very clear from these and other cases that where either is a party the other is altogether incompetent."

Statutes which remove merely the disqualification arising from interest do not remove the disqualification arising from the relation of husband and wife. 40 Cyc. 2210. See the same authority at pp. 2356-2357.

In 10 Ency. of Evidence, at page 165, *et seq.*, the rule is thus stated: "Neither husband nor wife can testify as to any communications between them made during the existence of the marriage relation.

"Change of common law rule by making one spouse a competent witness against the other does not affect the rule against disclosure of marital communications. Nor does the statute permitting a party to an action to call his adversary as a witness.

"The rule is not based upon the common law fiction of the identity of husband and wife, nor upon any actual voluntary confidence reposed in one spouse by the other, but upon the peculiar nature of the marriage relation.

"Whether a communication is to be considered as confidential depends upon its character as well as upon the relation of the parties. If the topic is such as would not have been discussed by husband and wife but for the relation between them, communications on the subject are privileged.

"But it has been held that all communications between husband and wife are privileged, and the rule is not limited to communications concerning subjects which are confidential in their nature."

Among the cases cited by the author just quoted is *Walker's Ex'or.* v. *Sanborn,* 46 Me. 470, where the court

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says that communications between husband and wife are sacred, and adds: "The exclusion, on this latter ground, rests not upon the nature of the evidence, but upon the source or mode in which the knowledge is obtained by the husband or wife." See also *State* v. *Jolly,* 26 N. C. 110, 32 Am. Dec. 656, and *Stickney* v. *Stickney,* 131 U. S. 227, 9 Sup. Ct. 677, 33 L. Ed. 136, where a similar statute to ours was being dealt with.

In *Wall* v. *Dimmet,* 132 Ky. 747, 117 S. W. 299, it was held that a wife could not testify that her husband showed her certain letters and afterwards destroyed them.

In *Yeppla* v. *Minn. Tribune Co., supra,* the contention was made that the statute only applied to communications of a confidential nature, but the court said that the language of the statute would not admit of such limitations. "The word 'communication' is used (as in sub-div. 3 of sec. 3346-a, supra) without qualification, and any such limitation as that suggested would be extremely difficult of application; it would introduce a separate issue in each case as to whether or not the communication was of a confidential character. To enable the court to judge as to its character the communication would have to be disclosed, and so the very mischief committed which was designed to be prevented."

The same rule was followed in *Campbell* v. *Chance,* 12 R. I. 333, construing a statute which, after making husband and wife competent as witnesses, provided that "neither shall be permitted to give any testimony tending to criminate the other, or to disclose any communication made to him or her by the other during their marriage."

Speaking of a similar statute, the court in *Reeves* v. *Herr,* 59 Ill. 81, says: "We do not find from the authorities that this rule of exclusion is confined to subjects which are confidential in their nature, and we think it should apply whenever the wife is called upon to dis-

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close any matter which came to her knowledge in consequence of the marriage relation."

A stronger case could not, in our view, be made than is made by the facts appearing in this record for the application of the rule prescribed by our statute, *supra*, construed in the light of the authorities construing similar statutes. These authorities are conclusive that Mrs. Wilkes was an incompetent witness to testify in the case, no matter by whom called; therefore, the evidence she was called on to give and was allowed to give should have been excluded.

With the testimony of Mrs. Wilkes out of the case, there is no evidence whatever to show how, when or by whom the mark by which it is claimed that the words "and finds it necessary" were cancelled was made, or whether intended to cancel or strike out these words as a part of the testamentary paper. It is clearly proven, in fact, not controverted, that the whole writing, including his signature, is in the handwriting of the testator, and quite naturally the witnesses examined on the subject were unable to say whether or not the mark through the words "and finds it necessary" were made by the same hand that wrote the balance of the paper and the signature thereto.

We have examined the original will, reaching the conclusion that the mark in question through the words "and finds it necessary" was intended and was sufficient to strike out those words as a part of the will, and in the absence of proof to the contrary it was to be presumed that the act of striking out those words by running the mark through them, or to a sufficient extent to indicate an intention to strike them out as a part of the will, was done by the testator's own hand.

The jury, responding to the issue submitted to them, having found by their verdict that all of the paper pur-

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porting to be the last will and testament of S. M. Wilkes, exhibited to them, "with the exception of and excluding the words and characters therein, to-wit, 'and finds it necessary,' is the last will and testament of S. M. Wilkes," the errors of the trial court in admitting the testimony given by Mrs. Wilkes, and in instructing the jury that no matter how slight or faint the cancellation marks in question are, yet, if placed there by his direction or consent they were effectual to cancel the words in question, and that if the testator merely "directed" the words in question to be cancelled it would be sufficient to operate as a cancellation without actual cancellation in fact, were harmless errors.

The jury upon sufficient evidence, without that given by Mrs. Wilkes, having returned a finding in accordance with the views expressed in this opinion, which was approved by the trial court, it follows that the decree appealed from has to be affirmed.

Affirmed.

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Syllabus.

Richmond

WINSTON AND OTHERS v. GORDON AND OTHERS.

January 15, 1914.

1. CORPORATIONS—*Deed by Directors—Ratification—Case in Judgment.*—Although a bank is hopelessly insolvent, directors have not power to execute a general deed of assignment of all its property for the equal benefit of all of its creditors. Such a deed can only be lawfully executed by the stockholders. If executed by the directors, however, though in excess of their authority, it is not wholly void, but is capable of being rendered valid by ratification or acquiescence, and, in the case in judgment, the whole course of dealing bearing upon the subject and the conduct of the litigation shows that the deed executed by the directors has been ratified and acquiesced in by the stockholders and the conduct of directors has been such as to estop them to deny its due execution.

2. PRINCIPAL AND AGENT—*Unauthorized Act of Agent—Ratification—Slight Evidence.*—An act of an agent from which he derives no personal benefit, but which is done in good faith for the benefit of his principal, and which was apparently necessary and would redound to his benefit, will be held to have been ratified and acquiesced in, and be thereby rendered valid upon slight evidence. If a principal knows that an agent has transcended his authority, he must promptly disavow the act, or he makes it his own. This doctrine of the ratification of the acts of agents is as applicable to corporations as to other principals.

3. LIMITATION OF ACTIONS—*Banks—Negligent Bank Directors May Plead—Trusts.*—Directors of a bank, which is a going concern, are not trustees of an express trust, with respect to the property or funds of the bank, but of an implied or resulting trust created by operation of the law upon their official relation to the bank, and the statute of limitations and the doctrine of laches may be invoked in their defense when sued for a breach of such trust.

4. LIMITATION OF ACTIONS—*Bank Directors—Statute Applicable—When Right of Action Accrues.*—The cause of action against the directors of a bank for neglect of duty as such directors does not

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grow out of contract but out of their breach of duty, and hence the statute of limitations of three years does not apply, but the wrongs which constitute the cause of action are damages to property revivable upon the death of either party, and the limitation applicable thereto is five years, as provided by section 2927 of the Code. Where fraud is neither alleged nor proved, and no concealment of liability on the part of the defendants is shown, the act of limitations begins to run from the time the alleged wrongs, if any, were committed.

Appeal from a decree of the Court of Law and Chancery of the city of Norfolk. Decree for the defendants. Complainants appeal.

Reversed.

The opinion states the case.

C. J. Collins, Williams, Tunstall & Thom, Jeffries, Wolcott, Wolcott & Lankford, for the appellants.

Walter H. Taylor, N. T. Green, James E. Heath, O. L. Shackelford, James G. Martin, Thos. H. Willcox, and *Tazewell Taylor,* for the appellees.

KEITH, P., delivered the opinion of the court.

The Traders and Truckers Bank of the city of Norfolk closed its doors on the 7th of August, 1909. On August 9 the board of directors passed a resolution, in pursuance of which the bank executed a deed of assignment of all its assets to James H. Winston. On August 11 Winston filed his bill in the court of law and chancery of the city of Norfolk, asking the guidance of the court in the administration of his trust. A few days thereafter, upon the petition of Winston, T. F. Tilghman and B. A. Banks were associated with him as co-trustees. On October 3, 1910, the trustees filed a petition in this suit for the administration of the trust under the guidance of the

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court, praying permission to bring suit against the directors, and on the same day a decree was entered authorizing and directing the trustees to bring suit against the directors for their misconduct and neglect in the administration of the affairs of the bank; and on October 4, 1910, the suit against the directors was entered.

Without going into minute details of the many delinquencies charged against the directors who were made parties defendant, it will suffice to say that it is alleged that they carelessly and negligently disregarded their duties as directors; that loans had been recklessly and improvidently made to insolvent corporations, firms and individuals; and that divers persons had been allowed to overdraw their accounts; and that by reason of these acts of omission and commission great loss had been inflicted upon the depositors.

By decree entered on the 8th of November, 1911, the plaintiffs were allowed to file an amended and supplemental bill. By leave of court, on the 2d of January, 1912, a second amended and supplemental bill was filed; but the amendments made in the two amended bills, in the view that we take of the case, need not be specifically considered. It is sufficient to say that both bills were demurred to, and that the demurrers were properly overruled.

To each of the bills, original and amended, the parties defendant filed pleas of the statute of limitations, alleging that the cause of action against them, if any existed, did not arise within one year, within two years, or within three years, prior to the institution of the suit or filing of the particular bill to which the plea was addressed. They also filed, by leave of court, a plea to the second amended and supplemental bill as follows:

"That the supposed deed of assignment from Traders and Truckers Bank to James H. Winston, trustee, averred

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in said bill and called Exhibit 'A' with said bill, is not the act nor deed of said Traders and Truckers Bank, and said Traders and Truckers Bank did not make said deed described as Exhibit 'A' with said bill, and said Traders and Truckers Bank did not authorize the making of said supposed deed mentioned as Exhibit 'A' with said bill."

Upon this plea of *non est factum*, as it may be called, issue was joined, and a jury was empaneled to try the same, in which Winston and others, trustees, were plaintiffs, and one Charles J. Calrow was the particular defendant.

In the progress of the trial the court instructed the jury as follows: "If the jury believe from the evidence that the deed of assignment to Winston was made without the authority of a stockholders' meeting they must find for the defendant."

To the giving of this instruction the plaintiffs objected; their objection was overruled and an exception taken. There was evidence before the jury that the execution of the deed was authorized at a meeting of the board of directors. There was no evidence, however, of a meeting of the stockholders. The jury found a verdict for the defendant, which the court refused to set aside, and certified the verdict to the chancery side of the court, and on the 1st day of May, 1912, entered a decree that "the court being of opinion that on the findings of the jury upon the trial on the law side of this court in this cause of said issue, that the said deed of assignment is invalid and void as to the said Charles J. Calrow, doth overrule said motion for a new trial, and . . . . it is adjudged, ordered and decreed that the said bill of the said plaintiffs as to the said Charles J. Calrow be, and the same is hereby dismissed, and that the said Charles J. Calrow recover his reasonable costs in this behalf expended."

The other defendants, who were situated similarly to Charles J. Calrow, moved the court "that inasmuch as it

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appears from the verdict of the jury aforesaid that the deed under which the complainants herein claim is not the deed of the defendant, the Traders and Truckers Bank, this suit be dismissed as to them also"; but the court refused to dismiss the suit as to the defendants other than Charles J. Calrow.

At this stage of the proceedings the plaintiffs asked and obtained leave to file a third amended and supplemental bill, to which the defendants demurred, and their demurrer was sustained, the court being of opinion that the board of directors of the insolvent Traders and Truckers Bank could not make a valid general assignment for the benefit of its creditors without the consent of its stockholders; and thereupon a decree was entered for costs and the cause removed from the docket.

The object of the third amended and supplemental bill is to show that the Traders and Truckers Bank and all concerned in or connected with it, including the defendants, have so acted with reference to the assignment of the property and assets of the bank to Winston, trustee, for the benefit of its creditors, and to the litigation which has followed and grown out of that assignment as to give validity and effect to the assignment by ratification, acquiescence in and conduct with respect thereto, by which they are now estopped to deny the due execution of the deed. From its recital of facts, which are in the main established by the record, it appears that the deed was made on the 9th day of August, 1909; that Winston filed a bill in chancery asking the aid of the court in the administration of the trust on the 11th day of August of that year; that the bill in the original suit was taken for confessed as to the bank, and that it, therefore, stands admitted, so far as the bank is concerned; that the deed of trust was duly and properly made, and is a valid conveyance of its assets; that in obedience to a decree in the original suit the

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present suit against the directors was instituted; that at the March rules, 1910, certain creditors and depositors of the Traders and Truckers Bank, suing on behalf of themselves and all other creditors of said bank, filed a bill in which the Traders and Truckers Bank and the several persons who were made defendants to the suit now before the court were made co-defendants, and in which a decree was asked against them for the same relief and based substantially upon the same causes of action as those set out in the several bills now before the court, in which bill it is alleged as follows:

"On August 9, 1909, the said bank having been hopelessly insolvent for a long time, its directors met and passed a resolution which reads as follows:

" 'Resolved, That a deed of assignment be made naming James H. Winston as trustee, and that he make a statement of the bank's condition to the public.'

"Pursuant to said resolution a deed of assignment was made to the said James H. Winston, trustee, in which all of the property and assets of the said Traders and Truckers Bank were conveyed to him, with power to convert the same into money and apply the proceeds to the payment of the indebtedness of said bank. A copy of said deed of assignment is herewith filed, marked Exhibit A, and the same is asked to be read as a part of this bill."

It further appears from the bill that the deed of assignment referred to as Exhibit A is the same Exhibit A as has been hereinbefore mentioned in this suit.

To this bill the several defendants filed their separate demurrers, each of which is based upon the ground, among others, that the bill shows that even if there were any right to bring the suit such right would be in James H. Winston, trustee, or in James H. Winston, B. A. Banks and T. F. Tilghman, trustees, and not in complainants; and that said bill does not show any excuse for suit being brought by complainants instead of by said trustees.

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Accordingly, the court of law and chancery of the city of Norfolk, on the 19th day of December, 1910, entered a decree upon that bill in the words following, to-wit:

"This cause came on this day to be again heard upon the papers formerly read, and upon motion of the defendants, who had filed demurrers in this cause, a reargument of said demurrers was had, argument being made by counsel for demurrants and for the plaintiffs.

"On consideration whereof, the court being of opinion that said demurrers should have been sustained and being of opinion that the bill shows that the plaintiffs, depositors in the Traders and Truckers Bank, had no right nor power themselves to bring this suit, the court doth adjudge, order and decree that said demurrer be sustained and that said bill be dismissed."

It appears that from that decree an appeal was taken, upon which a decree was rendered by the Supreme Court of Appeals at its June term, 1912 (*Murrell* v. *Traders and Truckers Bank,* 113 Va. 665, 75 S. E. 97), in which the decree of the court of law and chancery was affirmed.

The third amended bill further recites that, even after the institution of this suit, in which the pleas of the defendants were filed, the defendants answered the several bills, in which they failed to disclose or make known in any way the defense which they now set up by plea, and permitted decrees to be entered and the cause to be conducted as if this defense was not relied upon.

We have before us, then, a case in which the directors of a hopelessly insolvent bank, for the protection of the interests of all concerned, made a general deed of assignment of all its property for the equal benefit of all its creditors. It may be conceded at the outset that such a deed can only lawfully be executed by the stockholders; but the contention is that the act of the directors, while in excess of their authority, was not wholly void, but

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was capable of being rendered valid by ratification or acquiescence.

In *Peters* v. *Waverly, &c., Co.*, 113 Va. 318, 74 S. E. 168, this court said: "Although the action of the board of directors of a corporation, in selling and disposing of the entire property of the corporation, may have been in excess of their authority, nevertheless, if it was within the charter powers of the corporation itself, the action of the board is not void, but voidable only, and may be ratified by a majority of the stockholders."

That the proper execution of a deed such as that in question was within the charter powers of the Traders and Truckers Bank is nowhere questioned. The whole contention is that it was within the competency of the stockholders, but was beyond the power of the directors.

In Morawetz on Private Corporations, section 623, it is said: "If the shareholders, who constitute the corporate association, unanimously acquiesce in or ratify an act performed by an agent or board on behalf of the corporation, no further question as to the extent of the powers delegated to the agent or board can arise. Ratification by all the shareholders would not cure the illegality of an act which is prohibited by the common law or by statute; but it would remove any defect of authority in the agent performing the act, as between himself and the company. After such ratification, the company would become chargeable with the act, to the same extent as if it had originally authorized it to be done."

In section 619 of the same work the distinction is again drawn between such acts as are in violation of the company's charter, and therefore outside of the powers delegated to any of its agents, and such acts are as merely in excesss of the powers delegated to inferior agents by those who have appointed them, but are within the powers of the appointing agents.

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In *Keisey* v. *National Bank,* 69 Pa. St. 426, it is said: "The law is well settled that a principal who neglects promptly to disavow an act of his agent, by which the latter has transcended his authority, makes the act his own; and the maxim which makes ratification equivalent to a precedent authority is as much predicable of ratification by a corporation as it is of ratification by any other principal, and it is equally to be presumed from the absence of dissent."

And in 2 Kent's Com. 616, the law is thus stated: "It is a very clear and salutary rule in relation to agencies that where the principal, with knowledge of all the facts, adopts or acquiesces in the acts done under an assumed agency, he cannot be heard afterwards to impeach them under pretense that they were done without authority, or even contrary to authority."

It is well settled, and is agreeable to reason, that an act of an agent, from which the agent derives no personal benefit, but which is done in good faith for the benefit of his principal, and which was apparently necessary and would redound to his advantage, will be held to have been ratified or acquiesced in, and be thereby rendered valid upon slight evidence. If the principal knows that an agent has transcended his authority, he must promptly disavow the act, or he makes it his own. *Kelsey* v. *National Bank, supra.*

In *Sherman* v. *Fitch,* 98 Mass., at p. 64, the court said, speaking of the authority of an agent to execute a mortgage on behalf of a corporation: "It is not necessary that the authority should be given by a formal vote. Such an act by the president and general manager of the business of the corporation, with the knowledge and concurrence of the directors, or with their subsequent and long continued acquiescence, may properly be regarded as the act of the corporation. Authority in the agent of a corporation may

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be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals."

In *Fort Worth Publishing Co.* v. *Hitson et al.*, 80 Texas, 216, 14 S. W. 843, 16 S. W. 551, a private corporation was largely indebted and was considered insolvent. A new corporation was formed by practically the same men. The new corporation assumed the indebtedness of the first; the stock of the old was transferred to the new company. The property itself was delivered by the manager to the new company with the knowledge and consent of the stockholders of the first, but without any action by the board of directors. The property having been seized by creditors of the new corporation, it was claimed by the first. *Held:* The facts showing the dealings of the two corporations, their directors and stockholders, were relevant, and that the facts were evidence of ownership by the defendant. And the court said: "We can see no good reason why a corporation may not be bound by acts of acquiescence in a transaction which may be irregular on its face if not prohibited, or which may be in excess of the officer's power acting for the corporation."

In *Sheldon Hat Co.* v. *Eickemeyer Hat, &c., Co.*, 90 N. Y. 607, the court holds that "the doctrine of equitable estoppel, which prevents a principal from questioning an act of his agent done in his business, but not within the scope of the agent's authority, where the principal has not disaffirmed the act within a reasonable time after it came to his knowledge, applies to members of a corporate body as well as to persons acting in a private capacity."

In *Edelhoff* v. *Horner, &c., Co.*, 86 Md. 595, 39 Atl. Rep. 314, the court of appeals of Maryland decided that "when a mortgage of the chattels of a corporation is made by its officers, without authority, to secure funds to pay its debts and continue the business, and it receives the full benefit

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of the transaction, without objection, it will be presumed to have authorized or ratified the mortgage."

In the case of *Young* v. *Improvement Co.*, 48 W. Va. 512, 38 S. E. 670, the Improvement Loan and Building Association became insolvent and executed a deed of assignment of all its assets to Young and another, as trustees, and the trustees filed their bill against the Improvement and Loan Association, its stockholders, the Middlesex Knitting Company and other creditors, praying the aid and guidance of the court in the administration of the trust. The court rendered several decrees in the case, from all of which the Kilbourne Knitting Machine Company took an appeal. The court held that, by allowing the case to go on through many steps without any objection to the validity of the assignment on the ground that the board of directors caused it to be executed by the president without the authority of the stockholders, the appellants were estopped from making this defense; and in the course of the opinion the court said: "Suppose, however, that the appellants were not precluded by the bill taken for confessed against them, and the decrees thereon fixing the rights of the parties; still, they would be debarred from upheaving things as they propose, because of their laches in assaulting the deed on this merely technical point—merely technical when everybody admits that the association was wholly insolvent, unable to go on, and that the assignment was only what the stockholders surely would have done, or a court of equity would have done through a receiver. Not only would they be debarred by laches, but the appellants would be also thus debarred by their acts of recognition and ratification of that assignment. The deed of assignment was made September 24, 1897. Active steps were taken by the trustees by the institution of the suit to wind up in November, 1897. In February, 1898, on the bill taken for confessed, the case was referred to a com-

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missioner to report the assets, debts and stockholders, and the amount paid by the stockholders. The commissioner reported these things, and on May 28, 1898, a decree was made confirming the report, and another reference was made to the commissioner to settle the accounts of each stockholder with the association and with other stockholders, and to report a scheme by which stockholders could be made equal in the distribution of the assets. Upon the second report a decree of confirmation was entered, settling the rights of all the parties, in October, 1898. In February, 1899, for the first time, the knitting companies sought to raise this question of the validity of the assignment. Before that they had paid on their debts and stock, after that assignment, large amounts of money to the trustees under the assignment, thus recognizing and ratifying that assignment in a solemn manner. . . . If these knitting companies had anything to say against that assignment, which was an absolute necessity and such as a court would have authorized, why did they not answer the bill, which predicated relief on that assignment as valid? Why let the proceedings go on, before commissioner and court, for fourteen months, and decrees and orders entered on the basis of that assignment, without whispering a whisper of its technical invalidity? This acquiescence, failure to speak out in solemn legal proceedings when called upon to speak, . . . bars the knitting companies from setting up the invalidity of the assignment."

The deed under consideration was executed on the 9th of August. The original bill asking the guidance of the court was filed on the 11th of August. In October, 1910, the suit against the directors was entered, and in November, 1911, a supplemental bill was filed. On the 17th of January, 1912, the second amended and supplemental bill was filed. All these bills were answered by the defend-

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ants; numerous pleas of the statutes of limitations were taken, and while it is true that in the answers proof of all the allegations of the several bills is called for, nevertheless, until the filing of plea No. 10, known as the plea of *non est factum,* it was never suggested that the deed to Winston of August 9 was invalid because not authorized to be made at a meeting of the stockholders of the bank. These bills were taken for confessed as to the Traders and Truckers Bank, and no stockholder has in that capacity entered one word of objection to what has been done.

In the suit of *Murrell* v. *Bank,* 113 Va. 665, 75 S. E. 97, already referred to, certain creditors brought suit against these directors upon the same cause of action now in litigation. Numerous causes of demurrer were assigned, but there is no hint in any of them of the invalidity of the deed to Winston, and the demurrers were ultimately sustained upon appeal to this court upon the ground that the right of action was not in the creditors, but in the trustees; or rather, that there was no right of action in the creditors until the trustees had been requested to bring suit and had refused to do so.

We do not think that section 1105-a, sub-section 11, or section 1105-c, sub-section 30, were intended to cover a case such as this, but were designed to provide a means by which the voluntary dissolution and destruction of a corporation might be accomplished.

Upon this branch of the case we are of opinion that the whole course of dealing bearing upon the subject and the conduct of the litigation show that the deed to Winston, trustee, of August 9, 1909, had been ratified and acquiesced in by the stockholders, and that the conduct of the defendants had been such as to estop them to deny its due execution.

This brings us to the consideration of the statutes of limitation of one, two and three years, pleaded in this

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case. The court of law and chancery rejected the pleas of one and two years, and sustained the plea of three years' limitation, and this action is assigned as error by the appellants, who insist that the directors of a bank are trustees, and that there is no statutory bar to a suit against them for misconduct in the execution of their trust.

There are doubtless many cases in which directors are spoken of as trustees, and in a general sense they are trustees, but they are to be more accurately described as agents without compensation, who are responsible for the exercise of reasonable care in the performance of their duties.

In Words and Phrases, volume 8, at page 7822, it is said: "Directors of a bank are, in a certain sense, undoubtedly to be considered trustees, but only in that sense in which an agent or bailee intrusted with the care and management of property is considered a trustee. A director more nearly resembles a managing partner."

In 1 Morawetz on Private Corporations, at section 552, it is said: "Attempts have been made to define the degree of care and prudence which directors must exercise in the performance of their duties. In some of the cases it has been said that, inasmuch as directors are usually not paid for their services, they are to be regarded as mandataries —persons who have gratuitously undertaken to perform certain duties, and are bound to exercise only ordinary care and prudence. . . . But all this is at the best misleading. The plain and obvious rule is that directors impliedly undertake to use as much diligence and care as the proper performance of the duties of their office require. What constitutes a proper performance of the duties of a director is a question of fact, which must be determined in each case in view of all the circumstances—the character of the company, the condition of its business, the usual methods of managing such companies, and all other relevant facts must be taken into consideration."

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It seems that so long as a corporation is a going concern, neither it nor its governing body holds the corporate property in trust for its creditors.

It was held in *Boyd* v. *Mutual Fire Association,* 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, 61 L. R. A. 918, 96 Am. St. Rep. 948, that "so long as a corporation is a going concern, neither it nor its governing body holds the corporate property in trust for its creditors. The officers and directors of a corporation occupy a fiduciary relation, demanding care, vigilance and good faith, and if they are guilty of misfeasanec or malfeasance, the corporation may at once bring an action at law to enforce any such violations of duty. In such case, if the corporation refuses to act, its stockholders, before insolvency, and its creditors, after insolvency, may enforce such liability in the right of the corporation, and the fact that the creditor must sue in equity does not alter the running of the statute of limitations, since the application of the statute of limitations in equity is determined by the cause of action stated rather than by the nature of the relief demanded.

In *Cooper* v. *Hill,* 94 Fed. 582, 36 C. C. A. 402, the subject was fully considered and numerous authorities cited, and the court held: "The directors of a national bank are not trustees of an express trust with respect to the property or funds of the bank, but of an implied or resulting trust created by the operation of the law upon their official relation to the bank, and the statute of limitations and the doctrine of laches may be invoked in their defense when sued for a breach of such trust. Such an action is maintainable either at law or in equity, and a court of equity will follow the statute of limitations, unless unusual or extraordinary circumstances render its application inequitable in a particular case."

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In *Hughes* v. *Brown,* 88 Tenn. 578, 13 S. W. 286, 8 L. R. A. 480, the court, speaking through Mr. Justice Lurton, now of the supreme court, said: "Excepting alone suits between trustee and *cestui que trust* upon causes of action arising out of express trusts and cognizable alone in courts of equity, our general statutes of limitation apply to every cause or form of action, whether cognizable exclusively in courts of law, or concurrently in courts of law and equity, or exclusively in courts of equity."

In *Redford* v. *Clarke,* 100 Va. 115, 40 S. E. 630, this court said that "as a general rule the act of limitations does not run as between trustee and *cestui que trust* in express trusts, but the rule is otherwise as to constructive trusts. In respect to the statute of limitations, equity follows the law, and a demand that would be barred if asserted in a legal forum will be equally barred in equity."

We conclude, therefore, that the directors may rely upon the statute of limitations, and that the contention of appellants in this respect cannot be maintained.

The question then arises, What statute of limitations applies?

Section 2920 of the Code provides that "every action to recover money which is founded upon an award, or on any contract other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have first accrued; that is to say, if the case be upon . . . a bond of an executor . . . or any other fiduciary or public officer, or upon any other contract by writing under seal, within ten years; if it be upon an award, or be upon a contract by writing signed by the party to be charged thereby, or by his agent, but not under seal, within five years; if it be upon any oral contract, express or implied, for articles charged in a store account, although such articles be sold on a written order, within two years; and if it be upon any

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other contract, within three years," with certain exceptions which need not here be noted.

It would seem, therefore, that the three years' statute under section 2920 applies only to suits arising upon contracts, while the suit before us grows out of a breach of duty. If the plaintiff had seen fit to sue at law rather than in equity, the suit would have been an action of tort sounding in damages. We are of opinion, therefore, that the court erred in holding that the three years' statute applied.

It is still more certain that the two years' statute has no application to this case. There remains, then, but to consider whether the statute of one year or of five years is applicable.

In section 2927 it is provided that "every personal action for which no limitation is otherwise prescribed shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued."

Prof. Graves, dealing with this subject, and more particularly with respect to the right of assignees of actions for torts, says "that actions *ex delicto* (torts) are frequently assignable in equity, there can be no doubt; and at law the assignee can sue in the name of the assignor, as was done on the assignment of a bond. But all actions *ex delicto* are not assignable, even in equity, for it is sometimes considered against public policy, even in our day, to allow such an action to be made over to an assignee for money. Then what tort actions are assignable? The answer is such only as survive to or against the personal representative, if one of the original parties dies. Then what tort actions survive? The anwer is: Those for wrong to property, real or personal, or which grow out of breach

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of contract, but not for wrongs done to the person or reputation, or any purely personal wrong, apart from property or contract. An action for breach of promise of marriage does not survive at common law, nor under the Virginia statute." Graves on Pleading, page 16.

In Burks on Pleading and Practice, section 220, referring to section 2927 of the Code, it is said: "Whether the limitation to be applied in a particular case is a tort or contract limitation, where either may be brought, is determined by the object of the action and not simply by its form. If the injury sought to be redressed is merely personal, whether resulting from breach of contract or from tort, the action dies with the person and the tort limitation applies." Citing *Grubb* v. *Sult,* 32 Gratt. 203, 34 Am. Rep. 765; *Birmingham* v. *C. & O.,* 98 Va. 548, 37 S. E. 17.

In *Mumpower* v. *City of Bristol,* 94 Va. 737, 27 S. E. 581, an action was brought for maliciously and without probable cause suing out an injunction against the plaintiff, whereby the operation of his mill was suspended, and it was held that it was barred after one year from the dissolution of the injunction. The court considered the effect of section 2655 of the Code, which is as follows: "An action of trespass, or trespass on the case, may be maintained by a personal representative for the taking or carrying away of any goods, or for the waste or destruction of, or damage to, any estate of or by his decedent." The court said: "It is quite obvious that this injunction did not operate to take or carry away the goods of the plaintiff, nor cause the waste or destruction of, or inflict any damage upon the estate of the plaintiff. It is true that the language of the statute is comprehensive and embraces damage of any kind or degree to the estate, real or personal, of the person aggrieved; but the damage must be direct and not the consequential injury or loss to the estate which flows from a wrongful act directly affecting the person

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only. No part of the defendant's property was taken or carried away; no part of it was wasted or destroyed."

As we have already said, there is no circumstance or element of injury to the person in this case. The wrong, if any, was to rights of property which, if the facts alleged in the bill are true, was of a serious and grievous nature.

In White & Tudor's Leading Cases in Equity, vol. 2, pt. 2, page 1624, note to *Ryall* v. *Rowles,* dealing with the subject of equitable assignments, the authors say: "To bring a cause of action within the scope of this doctrine, it must result from an injury to an existing right of property or from the breach of a contract which would have conferred such a right if it had been fulfilled, and the right to compensation in damages for injuries which are merely personal, as affecting the sufferer in mind, body or reputation, cannot be assigned in equity or at law."

The statement of Mr. Graves must always be borne in mind that actions are assignable which survive, and that those which do not survive are not assignable.

At page 1626 of White & Tudor's Leading Cases in Equity, *supra,* it is said: "All choses in action embracing demands which are considered as matters of property or estate are now assignable either at law or in equity. Nothing is excluded but mere personal torts, which die with the party. A claim, therefore, for property fraudulently or tortiously taken or received, or wrongfully withheld, and even for an injury to either real or personal property, may be assigned. The principle is the same where property is lost or injured through the negligence of an agent, bailee or common carrier, and hence the transfer of such a cause of action will confer an equitable right on the assignee."

In New York the statute, which in a general way corresponds with section 2655 of our Code, preserves from abatement by death actions "for wrongs done to the property, rights or interests of another." In *Cregin* v. *Brook-*

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lyn Crosstown R. Co., 75 N. Y. 192, 31 Am. Rep. 459, the action was brought by the husband against a carrier of passengers to recover for the loss of services of his wife and for expenses paid in consequence of injuries to her person resulting from the defendant's negligence while she was a passenger, and it was held that the action did not abate upon the death of the plaintiff, but might be revived in the name of his personal representatives. In the course of its opinion the court said: The husband "had a right to the services of his wife; they were of pecuniary value to him, and any wrong by which he was deprived of these services or put to expense to remedy or palliate the consequences of the injury to his wife was a wrong done to his rights and interests. Adopting the construction that pecuniary rights and interests only are protected by the statute, these were plainly involved, . . ." and it was held that the action survived.

In *Lee's Admr.* v. *Hill,* 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666, this court said "that where a cause of action is founded in tort, unconnected with contract, and affects the person only, and not the estate, the action dies with the person; but where the action is founded on contract, although nominally laid in tort, the action survives." In a note to that case in 24 Am. St. Rep., at page 672, it is said that "actions founded on contract, where there is some wrong to the property, rights or interests of another, survive the death of the wrong-doer, but the action will not survive when such injuries are personal in their nature."

In 1 Cyc., page 49, the law upon the subject is well summarized as follows: "At common law, as a general rule, the qualities of assignability and survival are tests each of the other and are convertible terms. The question whether an action survives depends upon the nature of the action and not upon the form of it. It has been held that the line of demarcation at common law, separating

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those actions which survive from those which do not, is that in the first the wrong complained of affects primarily and principally property and property rights, and the injuries to the person are merely incidental, while in the latter the injury complained of is to the person, and the property and rights of property affected are merely incidental. At common law the rule was a general one that actions *ex contractu* survived the death of a party to the action, but where the damage resulting was to the person the rule was otherwise."

It was very earnestly contended, on behalf of the appellants, that whatever limitation might be determined upon would begin to run only from the time that appellants had knowledge of the facts upon which the cause of action arose.

Speaking of section 2927, Burks on Pleading and Practice, page 385, says: "This section seems broad enough to cover actions for fraud. The main question of difficulty is whether the statute begins to run from the commission of the fraud or from its discovery. It has been held in Virginia that no lapse of time and no delay in bringing a suit, however long, will defeat the remedy in case of fraud or mutual mistake, provided the injured party, during such interval, was ignorant of the fraud or mistake. But the case in which this language is used (*Crauford* v. *Smith*, 93 Va. 623, 23 S. E. 235, 25 S. E. 637) was one of mistake and not of intentional fraud, and the suit was in equity and not at law. At law the statute probably runs from the commission of the fraud. In West Virginia it is said (*Thompson* v. *Whittaker Iron Co.*, 41 W. Va. 754, 23 S. E. 795) that where a cause of action arises out of a fraud the statute of limitations runs from its perpetration, and that to deduct the period during which a party is ignorant of the fraud, his ignorance must arise out of some positive act on the part of the defendant. Mere silence is not suffi-

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cient, but there must be some act designed to conceal the existence of liability and operate in some way upon the plaintiff to prevent or delay suit for it, otherwise it will not come within the saving clause of the statute directed against obstructing the prosecution of a right by any other indirect ways or means."

In this case there is neither proof nor averment of fraud, nor of any act done designed to conceal the existence of liability, or which operated in any way upon the plaintiffs to prevent or delay the bringing of suit. We think, therefore, that the circuit court was right in saying that the statute of limitations began to run from the time the alleged wrongs, if any, were committed, but that the statute of five years, and not of three, should have been adopted by the court.

To recapitulate briefly: As to the statute of limitations, we are of opinion, first, that the directors of the Traders and Truckers Bank were not express trustees, and may, therefore, plead the statute of limitations; second, that the cause of action against them grew not out of the contract, but out of a breach of duty, and, therefore, the statute of limitations of three years does not apply; third, that the wrongs which constitute the cause of action sued upon are damage to property, and a suit to obtain redress may be revived upon the death of the wrong-doer, or that of the person injured, and as a consequence the limitation is five years, as provided by section 2927 of the Code; and, finally, that as fraud is neither averred nor proved, and no concealment of liability on the part of the defendants is shown, that the act of limitation began to run at the time the alleged wrongs, if any, were committed.

For the foregoing reasons the decree complained of must be reversed and the cause remanded for further proceedings, to be had not in conflict with this opinion.

Reversed.

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CRIMINAL CASES

Wytheville

LOONEY V. COMMONWEALTH.

June 16, 1913.

Absent, Keith, P.

1. CRIMINAL LAW—*Change of Venue—Jury From Another County—Discretion of Trial Court—Appeal and Error.*—The trial court, in the exercise of the powers to change venue and summon juries from another county, conferred by sections 4024 and 4036 of the Code, must of necessity be allowed a wide discretion, and it is the established rule that this court will not reverse the judgment of the trial court unless it plainly appears that such discretion has been improperly exercised.
2. CRIMINAL LAW—*Jury From Another County—Change of Venue—Jury Obtained—Presumption.*—Generally a motion for a jury from another county or corporation should precede the motion for a change of venue (though cases may arise where this rule would be inapplicable); and where the motion for a change of venue is based on the ground that an impartial jury cannot be obtained in the county or corporation, the fact that an impartial jury was subsequently secured in the county raises a conclusive presumption that the motion was unfounded.
3. CRIMINAL LAW—*Renewal of Motion for Change of Venue or Foreign Jury.*—Although motions for a jury from another county, or for a change of venue, may have been properly overruled at one term of the court, they are reviewable at a subsequent time whenever the exigencies of the situation may call them into requisition.
4. CRIMINAL LAW—*Venire—Code, Section 4018, Mandatory—Case at Bar.*—Section 4018 of the Code prescribes the manner of selecting and summoning a venire in a case of felony, and its provisions are mandatory. Under its provisions, not more than twenty names can be drawn and placed in the list except for

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good cause shown, and when more than twenty presons are ordered to be drawn and summoned the number drawn shall in no case be more than four in excess of the number to be summoned. The manifest object of the statute is to secure a drawn list of veniremen and to render it impossible to pack the jury. The violation of these provisions of the statute constitutes reversible error. In the case at bar, the first *venire facias* had been quashed, and the method adopted by the judge for obtaining the names for the second venire (making out a list of sixty names and directing the summoning forthwith of only thirty from that list) clearly indicated an intention on his part to secure the names of the thirty veniremen who had been summoned under the first venire. This was a departure from the mandatory provisions of the statute and constitutes reversible error, notwithstanding the good faith of judge and the probity of his motives.

5. CRIMINAL LAW—*Evidence—Controversy With Other Persons.*—On a trial for homicide, evidence of the details and merits of an antecedent controversy between the prisoner and a third person, in no way connected with the case on trial, occurring at a different time and place, and with which deceased was not concerned, and at which he was not present, and constituting no part of the *res gestae* of the case on trial, is not admissible.

6. CRIMINAL LAW—*Evidence—Town Ordinance—Authentication.*—Although the records of a town council were kept in a crude and careless manner, in an account book which had been used for other purposes and contained matter other than the by-laws and ordinances, the book may be received in evidence and will be sufficient proof of the adoption of an ordinance contained therein, if the record, when considered as a whole, contains a sufficient authentication of the passage of the ordinance in question.

7. CRIMINAL LAW—*Resisting Arrest—Provoking Affray—Killing Officer—Instructions.*—The following instruction without the modification made by the court, indicated by italics, is held to be erroneous: "The court instructs the jury that although they may believe from the evidence that the deceased at the time he was shot was attempting to arrest the accused, yet if they further believe from the evidence that in making such attempt he shot at the accused, and thereupon, because of said shooting at the accused by the deceased, the accused, believing himself in imminent danger of being killed or sustaining great bodily harm, *and being without fault in provoking the affray,* returned the fire and killed the deceased, such killing was not

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murder, notwithstanding the jury may believe from the evidence that the accused had previously threatened to kill anyone who might attempt to arrest him."

8. CRIMINAL LAW—*Making Arrest—Resistance—Justification—Burden of Proof.*—When an officer armed with a lawful warrant attempts to make an arrest in obedience to its mandate, the *prima facie* presumption, in the absence of evidence to the contrary, is that he will discharge his duty in a lawful manner; and the burden rests on the accused, who undertakes to resist the arrest, to show that the officer's conduct was such as to justify such resistance.

Error to a judgment of the Circuit Court of Craig county.

Reversed.

The opinion states the case.

O. B. Harvey and *Wm. E. Allen,* for the plaintiff in error.

Samuel W. Williams, Attorney General, and *J. P. Jones,* for the Commonwealth.

WHITTLE, J., delivered the opinion of the court.

The plaintiff in error, Harvey D. Looney, was found guilty of murder in the first degree, and, in accordance with the verdict of the jury, was sentenced to death by the circuit court of Craig county. The case is before us on a writ of error to that judgment.

The prisoner, when put upon trial, moved the court for a change of venue under section 4036 of the Code, the grounds for the motion being that the county of Craig is a small mountainous county sparsely settled, and that in the town of New Castle, the county seat and scene of the homicide, and throughout the entire county great prejudice and ill-will existed against the accused, both on account of the homicide and of numerous other difficulties in which he had been involved; that the deceased had a

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large relationship and connection in the community and many wealthy and influential friends, who were taking an active part against him, and by whom the entire bar of the county had been employed to aid the prosecution; moreover, that he had been informed of threats to lynch him in the event of his acquittal. For these reasons the accused alleged that he could not secure a fair and impartial trial in the county. The affidavits of five persons were offered in support of the petition, and of twenty persons in opposition to the change of venue, and the court overruled the motion. Thereupon, the accused submitted a motion under section 4024 for a venire to be summoned from some other county or corporation, which motion was likewise overruled. The action of the court upon these motions constitutes the first and second assignments of error.

The trial court, in the exercise of the powers conferred upon it by sections 4024 and 4036, must of necessity be allowed a wide discretion, and it is the established rule that this court will not reverse the judgment of the trial court unless it plainly appears that such discretion has been improperly exercised. *Wormley's Case,* 10 Gratt. (51 Va.) 658, 672-3; *Cahoon's Case,* 21 Gratt. (62 Va.) 822; *Sand's Case,* 21 Gratt. (62 Va.) 871, 882-884; *Richards' Case,* 107 Va. 881, 59 S. E. 1104; *Bowles' Case,* 103 Va. 816, 48 S. E. 527.

It is also the general rule that a motion for a jury from another county or corporation should precede the motion for a change of venue; and where the motion is based on the ground that an impartial jury cannot be obtained in the county or corporation, the conclusive presumption from the fact that an impartial jury has subsequently been secured in the county is that such motion was unfounded. *Wright's Case,* 33 Gratt. (74 Va.) 880; *Joyce's Case,* 78 Va. 289; *Waller's Case,* 84 Va. 492, 496, 5 S. E. 364. Cases

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may arise, however, where the general rule would be inapplicable and a motion for a change of venue should precede a motion for a jury from another county. *See Uzzle* v. *Commonwealth,* 107 Va. 919, 60 S. E. 52.

We are of opinion that there is no reversible error in these assignments; nevertheless, as both motions depend upon conditions existing at the time of trial, they are, as a matter of course, renewable upon a new trial whenever the exigencies of the situation may call them into requisition.

The third assignment of error is to the refusal of the court to quash the second *venire facias.* The facts touching this assignment are not disputed. On motion of the prisoner the first *venire facias* and list of veniremen was quashed because the venire was drawn in the presence of G. W. Layman, the commissioner in chancery designated for that purpose, it appearing that he was the active head of the prosecution. Thereupon the judge asked the sheriff if the persons summoned under the venire which had just been quashed were present in court, and being informed that they were still in attendance, he retired with the clerk to the clerk's office and shortly returned into court with a list of veniremen and a new *venire facias.* The accused submitted a motion in writing to quash the second list of veniremen and *venire facias* for certain reasons enumerated in the motion, which motion the court overruled. In that connection the court made the following statement: "All the names remaining in the jury box were drawn and all the available jurors in the box utilized, including such of the jurors as were upon the *venire facias* which was quashed in this case as were eligible jurors. That resulted in the drawing of sixty names. The judge of the court supposed that probably at least thirty of the jurors that had been drawn under the former *venire facias* were in attendance upon the court, and naturally expected that

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the sheriff, being ordered to sumon forthwith, would summon the same jurors that were drawn under the former *venire facias,* the court understanding that there was no intimation that those jurors were drawn fraudulently, or there was any improper or fraudulent conduct in the drawing of these former jurors; and furthermore, that if a jury free from exception cannot be gotten out of those in attendance upon the court under the former *venire facias,* and who are summoned under the present *venire facias,* of course the statute will be pursued until the proper jury is obtained. When the court ordered the second *venire facias* after the first one was quashed, the judge of the court and the clerk retired to the clerk's office. The clerk produced the jury box, unlocked it, placed it on the table, and with a piece of paper in front of him prepared to record the names of the eligible jurors. The judge drew the folded ballots from the box in the presence of the clerk, no one else being present but himself and the clerk, read the name of the juror, discussed with the clerk where he lived, his proximity to New Castle, his relationship, if any, to the prisoner, as well as to Mr. Oscar Martin, and selected sixty names from the box, which exhausted all of the eligible ballots in the box. The clerk then prepared the *venire facias* in due form, inserted the names so selected and delivered the writ to the sheriff, by which he was directed to summon thirty of that number."

Section 4018 of the Code prescribes the manner of selecting and summoning a venire in a case of felony. The ordinary course of procedure is for the list to contain the names of twenty persons drawn by the clerk of the court or his deputy from the names in the box as provided for by sections 3142 and 3144. The drawing must be in the presence of the judge of the court, or, in his absence, of one of the commissioners in chancery designated for the purpose under section 3146, and also a reputable citizen

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not connected with the accused or the prosecutor; or, in case of homicide, with the deceased, who shall be called upon for that purpose by the clerk conducting the drawing. If the attendance of the commissioner cannot be obtained, the drawing shall be in the presence of two reputable citizens not connected as aforesaid and called upon by the clerk. If there is drawn from the box the name of a person who has died, removed from the county, or is related to the accused or the prosecutor, or, in case of homicide, to the deceased, or lives within three miles of the place where the crime is charged to have been committed, such name shall not be placed on the list, but all other names drawn from the box shall be placed on the list as they are drawn, and when twenty names have been so placed the drawing shall cease. The section further provides that for good cause shown the judge may direct more than twenty names to be drawn and placed on the list and more than sixteen persons to be summoned. In such case he shall specify the number of names to be drawn and the number of persons to be summoned, and the number drawn shall not be more than four in excess of the number to be summoned. The concluding paragraph of the section declares that no irregularities or errors in drawing the names, or in making out or copying or signing or failing to sign the list, or in summoning the persons named in the list, shall be cause for summoning a new panel or for setting aside a verdict, or granting a new trial, unless objection thereto was made before the jury was sworn, and unless it appears that the irregularity, error or failure was intentional, or was such as to probably cause injustice to the Commonwealth or to the accused.

The record shows a plain departure from imperative provisions of the statute in several essential particulars. No good cause, or indeed any cause, was shown for directing more than twenty names to be drawn and placed in the

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list to be summoned. Nevertheless, the second list of veniremen contained the names of sixty persons, and the order of the court and *venire faicias* directed the officer to summon only thirty from that list. Moreover, the mandatory provision of the law, that when more than twenty persons are ordered to be drawn and summoned, the number shall in no case be more than four in excess of the number to be summoned, was wholly disregarded.

The manifest object of the foregoing provision of the statute is to secure a drawn list of veniremen and to render it impossible to pack the jury. Sixty veniremen, it is true, were in form drawn from the jury box, yet the persons summoned on the second venire were practically the same persons summoned on the quashed venire. Substantially the same result would have followed if there had been no drawing and the court had merely ordered the sheriff to re-summon the original veniremen.

In these circumstances, the persons to be summoned were known in advance, and the solemnity of drawing the veniremen was an empty form. It was clearly the intention of the judge, by the method adopted, to secure the names of the thirty veniremen in attendance on the court; yet, had the statute been complied with, there would have been a list of fifty-six persons instead of thirty from whom to select the jury.

In what has been said we do not wish to be understood as in any way reflecting upon the integrity of the honorable judge of the circuit court. It was conceded that he acted in good faith. He did not think that the ground for quashing the original *venire facias* involved the eligibility of the veniremen, but merely the fitness of the commissioner in chancery to participate in drawing them, and his sole purpose in pursuing the method adopted was to facilitate the trial of the case. Still, the probity of his motives cannot justify the utter disregard of these imperative and

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essential provisions, and such omission to comply with the statute constitutes reversible error.

In *Hall's Case,* 80 Va. 555, 561, the court, speaking through Lewis, P., says: "These provisions of the statute, in respect to empaneling juries, are not directory merely, but imperative. They are rules which are made essential in proceedings involving life or liberty, and it is the right of the accused to demand that they be strictly complied with. The disregard of them is to deprive the accused of that 'due process of law' which is provided by the legislature, and which is required by the fundamental law of the land."

The importance of the observance by the courts of these safeguards thrown around the accused cannot be overstated. As was well said by Judge Harrison in *Hoback's Case,* 104 Va. 871, 879-80, 52 S. E. 575, 578: "Jurors as triers of the fact wield far more power than the judge on the bench, in the trial of an accused person, and the legislature has seen fit to safeguard the rights of the Commonwealth and the accused by the enactment of mandatory provisions for the constitution of this important branch of the judicial system, which the courts are not at liberty to disregard, even if they deemed it expedient to do so." *Jones' Case,* 100 Va. 842, 41 S. E. 951; *Patrick's Case,* post p. 78 S. E. 628, in which an opinion has been handed down during the present term.

We may observe that *Hardy's Case,* 110 Va. 910, 67 S. E. 522, does not sustain the action of the trial court in the particulars we have been discussing. In that case the irregularity complained of was that the sheriff summoned the entire list of forty persons drawn as veniremen instead of thirty-six as ordered by the court—an irregularity which could not have prejudiced the accused.

The fourth assignment of error involves the admission by the court, over the objection of the accused, of the de-

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tails and merits of an antecedent controversy between the prisoner and W. O. Caldwell. There was no connection between that difficulty and the subsequent shooting of the deceased. It occured at a different time and place, and the deceased was not present or concerned in the altercation. The evidence was not connected with the homicide and was no part of the *res gestae;* it was, therefore, inadmissible. *Joyce's Case,* 78 Va. 287; *O'Boyle's Case,* 100 Va. 785, 40 S. E. 121.

The fifth assignment of error challenges the authentication of the ordinance of the town of New Castle, upon which warrants for the arrest of the prisoner were based.

It is true that the records of the council were kept in a crude and careless manner in an account book or ledger which had been used for other purposes and contained matter other than the by-laws and ordinances, and, moreover, that a sheet of type-written matter, concerning the business of the town, was injected between the by-laws and ordinances and the certification and signatures of the clerk and mayor. But, considering the record as a whole, we think it contains a sufficient authentication of the passage of the ordinance in question, and was properly admitted in evidence.

The sixth and last assignment of error which demands our attention relates to the ruling of the court in relation to instructions.

While the record shows that the accused excepted to the refusal of the court to give a number of instructions, and also to its action in modifying other instructions, those to which our attention was specifically drawn by the oral argument were 11, 14, 15, 16 and 20.

The court modified 11 by interpolating the words, "being without fault in provoking the affray," and 16 by words of like import. Instruction 11, as modified, is as follows:

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"The court further instructs the jury that although they may believe from the evidence that the deceased at the time he was shot was attempting to arrest the accused, yet if they further believe from the evidence that in making such attempt he shot at the accused, and thereupon, because of said shooting at the accused by the deceased, the accused, believing himself in imminent danger of being killed or sustaining great bodily injury, *and being without fault in provoking the affray,* returned the fire and killed the deceased, . . . such killing was not murder, notwithstanding the jury may believe from the evidence that the accused had previously threatened to kill any one who might attempt to arrest him."

This instruction does not undertake to define the degree of guilt of the accused, if any, in the circumstances set forth in the instruction. But upon substantially the same hypothetical statement of facts the jury are told in instruction 16 that the killing would be justifiable (more accurately, *excusable*) homicide. Both the instructions without the modification would have been erroneous, and instruction 14 is amenable to the same objection.

Instructions 15 and 20, which are practically identical, are not a correct exposition of the law. Instruction 15 told the jury "that when the Commonwealth relies upon the fact that the homicide was committed by the defendant during the resistance to a lawful arrest, it has the burden of proving the legality of the arrest beyond a reasonable doubt."

Where an officer armed with a lawful warrant attempts to make an arrest in obedience to its mandate, the *prima facie* presumption, in the absence of evidence to the contrary, is that he will discharge his duty in a lawful manner; and the burden rests upon the accuser, who undertakes to resist the arrest, to show that the officer's conduct was such as to justify such resistance.

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As a new trial must be granted upon other grounds, it is unnecessary to consider the court's action in overruling the motion of the accused for a continuance.

For the errors to which attention has been called, the judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial to be had therein.

Reversed.

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Syllabus.

Wytheville

PATRICK v. COMMONWEALTH.

June 16, 1913.

Absent, Keith, P.

1. CRIMINAL LAW—*Venire—Drawing—Presence of Attorney for Commonwealth.*—While juries in civil cases may be drawn in the presence of the attorney for the Commonwealth, there is no authority for his presence when juries are to be drawn in felony cases. He is one of the parties to the proceeding in which the jury is to sit, and it has always been the policy of our law, as far as human caution could reasonably provide, to see that the officials who select juries, as well as the jurors themselves, should stand impartial and unprejudiced. But whether or not the unauthorised presence of the attorney for the Commonwealth in the case at bar, at the drawing of the jury, was probably prejudicial to the accused, it is not decided.
2. JURORS—*Selection.*—The rule of the common law is that no one should take part in the selection of jurors who does not stand indifferent between the parties, and there is nothing in our statutes which changes that rule.
3. CRIMINAL LAW—*Venire Facias—Wrong Number of Jurors—Code, Section 4018—General Order of Judge for Different Number.*—Under the provisions of section 4018 of the Code, the clerk has no power or authority to issue a *venire facias* in a felony case directing the sheriff to summon twenty-six persons from a list of thirty names, unless the judge of the court, for good cause shown, has directed it, and a previous general order entered by the judge of the court of his own motion before the offense was committed cannot authorize the clerk to draw or have summoned a different number of jurors from that prescribed by the statute. The statute directs twenty to be drawn and sixteen to be summoned, but provides that "for good cause shown in any felony case, the judge of the court in term time or vacation may direct more than twenty names to be drawn and placed on the list." The provision cannot be departed from except as provided by the statute.

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4. CRIMINAL LAW—*Venire—Wrong Number of Names—Intentional Selection.*—If the clerk, in obedience to an improper general order of the judge, makes out the *venire facias* in a felony case for and directs the summoning of a different number of jurors from that prescribed by section 4018 of the Code, this is an intentional irregularity, and not within the curative provisions of said section.

5. CRIMINAL LAW—*Venire Facias—Objection—Motion After Verdict.*—An objection to the action of the trial court in not directing a *venire facias* to be issued to complete the panel when a sufficient number of jurors was not obtained from the persons summoned and in attendance on the court, as required by section 4019 of the Code, comes too late after verdict.

6. CRIMINAL LAW—*Jurors—Selection—Statutory Provisions to Be Followed.*—The statutes in reference to the selection of jurors in felony cases were enacted, not only for the purpose of securing fit jurors, but to avoid even the suspicion of partiality or corruption in their selection. The fact that it may sometimes be inconvenient to the court or cause delay in the trial of a cause is no sufficient reason why they should not be strictly and rigidly enforced. The legislative intent in these matters should absolutely control the judiciary. The courts have no other duty to perform than to execute the legislative will without any regard to their own views as to the necessity or wisdom of the enactments.

Error to a judgment of the Circuit Court of Wise county.

Reversed.

The opinion states the case.

Bond & Bruce and *Alderson & Kilgore,* for the plaintiff in error.

Samuel W. Williams, Attorney General, for the Commonwealth.

BUCHANAN, J., delivered the opinion of the court.

The accused was indicted for murder in the circuit court for Wise county. Upon his trial he was found guilty of

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murder in the second degree and his term of confinement in the penitentiary fixed at thirteen years, and judgment was entered in accordance with that finding. To that judgment this writ of error was awarded.

The action of the court refusing to quash the *venire facias* is assigned as error.

The first objection made to that writ is that the list of names furnished by the clerk to the sheriff from which to summon the jury for the trial of the accused was drawn in the presence of the Commonwealth's Attorney of the county, in violation of section 4018 of Pollard's Code.

By that section it is provided that the drawing of the names from the jury box to be placed upon such list shall be done in the presence of the judge of the court, or in his absence, in the presence of one of the court's commissioners in chancery designated by the judge of the court for that purpose by an order entered of record, and a reputable citizen not connected with the accused or the prosecutor, or in case of homicide, with the deceased; and if the presence of such commissioner cannot be obtained, such drawing shall be in the presence of two reputable citizens not connected with the accused, the prosecutor, or, in case of homicide, with the deceased. While section 3146 of the Code authorizes the drawing of juries in civil cases in the presence of the attorney for the Commonwealth, there is no authority for his presence when juries are to be drawn in felony cases. On the contrary, it is clear from section 4018 of the Code, when read in connection with section 3146, that such official was purposely not included among those who should attend the drawing of juries in felony cases. The reason for such omission is apparent. He is counsel for the Commonwealth, one of the parties to the proceeding in which the jury is to sit. It has always been the policy of our law, as far as human caution could reasonably provide, to see that the officials who select juries,

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as well as the jurors themselves, should stand impartial and unprejudiced. To permit counsel on either side to take part in drawing a jury for the trial of a cause in which they are counsel would be to disregard that principle of the law, both common and statutory, which has always sought to guard the purity of the administration of justice from even the suspicion of partiality.

The rule of the common law is that no one should take part in the selection of jurors who does not stand indifferent between the parties, and there is nothing in our statutes which changes that rule. See *Woods* v. *Rowan, &c.*, 5 John. 133; *Munshower* v. *Patton,* 10 Serg. & R. (Penn.) 334, 13 Am. Dec. 678; *Peak* v. *State,* 50 N. J. Law 179, 12 Atl. Rep. 701, 705; *People* v. *Teague,* 106 N. C. 576, 11 S. E. 665; 24 Cyc. 226-7; 12 Enc. Pl. & Pr. 420.

Another objection made to the *venire facias* is that it directed the sheriff to summon twenty-six persons from a list of thirty names, instead of sixteen persons from a list of twenty names, as required by section 4018 of the Code.

It was held in *Jones' Case,* 100 Va. 842, 41 S. E. 951, that a *venire facias* which directs the summoning of a different number of jurors from that required by the statute in a felony case was invalid process. Since that decision section 4018 has been amended. It now provides that all names drawn from the jury box shall be placed on the list as drawn, except the names of persons who are dead, or have removed from the county or corporation, or are related to the accused or prosecutor, or, in case of homicide, to the deceased, or who are known by the clerk or other persons attending the drawing, if the case be in a circuit court of a county, to live within three miles of the place where the crime is charged to have been committed, and when twenty names have been so drawn and placed upon the list the drawing shall cease, and a copy of said list shall at once be made and signed by the clerk and the

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persons attending the drawing, and filed in the clerk's office. It also provides that the *venire facias* shall command the sheriff to summon sixteen persons from the list of names furnished him by the clerk, which shall contain the names of twenty persons for that purpose. That section further provides that "for good cause shown in any felony case, the judge of the court, in term time or vacation, may direct more than twenty names to be drawn and placed on the list . . ."

No such order was entered in this case, and the action of the clerk in drawing and placing thirty names on the list was wholly unauthorized and in plain violation of the section, unless, as claimed by the Attorney-General, the following order authorized the clerk's action:

"VIRGINIA:

"At a circuit court continued and held for Wise county at the courthouse thereof on Monday, April 24, 1911. Present: The same honorable judge presiding as on last Saturday.

"On motion of the judge of this court, it is ordered that the clerk of this court hereafter, in drawing the list of *venire facias* for the trial of criminal cases, draw the names of thirty persons, as required by law, and the sheriff shall summon twenty-six persons from said list, as prescribed by law."

That order was not entered in this or any other felony case, but was a general order made upon the court's own motion. It was entered in April, 1911, nearly a year and a half before the accused was indicted and long before the homicide for which he was tried had been committed. The order was not only unauthorized, but in violation of the provisions of section 4018, and furnished no authority for the clerk's action in this case to draw and place upon the

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list more than twenty names. The clerk not only had no authority to draw and place upon the list more than twenty names, but he was prohibited from doing so, for that section expressly declares that when twenty names have been drawn and placed upon the list "the drawing shall cease." *Looney's Case, ante.* p. 921.

It is clear under the *Jones Case, supra,* and the decisions cited in the opinion of the court in that case, that the motion to quash the *venire facias* on this ground ought to have been sustained, unless the failure to comply with the provisions of section 4018 in that respect is cured by the further provision contained in it; that "no irregularity or error in drawing the names, or in making out or copying or signing or failing to sign the list, or in summoning the persons named in the list, shall be cause for summoning a new panel or for setting aside a verdict or granting a new trial, unless objection thereto was made before the jury was sworn, and unless it appears that such irregularity or error or failure was intentional, or is such as to probably cause injustice to the Commonwealth or to the accused."

The objection to the *venire facias* was made before the jury was sworn, and there can be no question that the irregularity or error in drawing and placing upon the jury list more names than the statute authorized or permitted was intentional. This being so, it follows that the irregularity complained of is not within the curative provisions of section 4018, and that the court ought to have sustained the motion to quash the *venire facias* on that ground.

Whether or not the unauthorized presence of the Commonwealth's Attorney at the drawing of the jury was probably prejudicial to the accused need not be decided, as it is not likely to occur in drawing the next jury, and as the judgment complained of has to be reversed upon another ground.

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Error is also assigned to the action of the court in not directing a *venire facias* to be issued to complete the panel when a sufficient number of jurors was not obtained from the persons summoned and in attendance on the court, as required by section 4018 of the Code. There being no objection to this action of the court until after the jury was sworn, indeed, until after the verdict found, it came too late, and the motion to set aside the verdict on that ground was properly overruled.

Error is assigned to the action of the court in giving instruction No. 4 asked for by the Commonwealth, and in refusing to give instruction No. 8 offered by the accused, as offered, and giving it as amended by the court. The ground of objection to these instructions, as given, is that they were based upon the theory that there was evidence tending to show that the defendant was at fault in bringing on the difficulty in which the homicide was committed, when in fact there was no such evidence. If this be true the instructions as given were erroneous, and upon the next trial, if there be no such evidence, instructions based upon that hypothesis ought not to be given.

As there are now in our hands six felony cases, either upon the docket or upon petition for writs of error, in which the principal errors assigned are based upon alleged violations or disregard of our statutory provisions in reference to the selection of jurors, it may not be improper for this court to impress upon the trial judge the great importance, if not absolute necessity, of seeing that these statutes are strictly complied with. Our statutory provisions on the subject are plain and not difficult to enforce. They were enacted, not only for the purpose of securing fit jurors, but to avoid even the suspicion of partiality or corruption in their selection. The fact that it may sometimes be inconvenient to the court or cause delay in the trial of a cause is no sufficient reason why the

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statutes should not be strictly and rigidly enforced. The legislative intent in these matters should absolutely control the action of the judiciary. The courts have no other duty to perform than to execute the legislative will without any regard to their own views as to the necessity or wisdom of the enactments. Sedgwick on Stat. Constr. 325.

The judgment complained of must be reversed for failure to comply with the law in drawing the number of names to be placed on the jury list, the verdict set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

Reversed.

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Staunton

DRAPER. v. COMMONWEALTH.

September 11, 1913.

Absent, Keith, P.

1. CRIMINAL LAW—*Non-Support of Wife—Evidence—Other Children to Support.*—On the prosecution of a husband for the non-support of his wife, evidence that he had two small children by a former wife dependent upon him for support is inadmissible where the non-support of the wife was total.
2. CRIMINAL LAW—*Non-Support of Wife—Wife Self-Supporting After Separation.*—The fact that the wife, after separation from her husband, caused by his misconduct, takes service and supports herself in no condonation of his offense, and no answer to an indictment against him for her non-support.
3. CRIMINAL LAW—*Non-Support of Wife—Motive for Prosecution—Testimony of Wife.*—On the prosecution of a husband for the desertion and non-support of his wife, it is immaterial to enquire what motive may have actuated her to testify against him, as the prosecution is one by the Commonwealth against the accused for a violation of the criminal law of the State.

Error to a judgment of the Corporation Court of the city of Roanoke.

Affirmed.

The opinion states the case.

Hairston & Willis, for the plaintiff in error.

Samuel W. Williams, Attorney General, for the Commonwealth.

WHITTLE, J., delivered the opinion of the court.

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This writ of error brings under review the judgment of the corporation court of Roanoke city of conviction of the accused, James Draper, under Va. Code, sec. 3795-c, for desertion and non-support of his wife.

The evidence sustains both allegations of the indictment; and, therefore, if a motion to direct a verdict in favor of the accused were permissible at all under our procedure, it was properly overruled in this instance.

The other errors assigned by the accused which demand notice are these: (1) The refusal of the court to admit evidence to show that the accused had two small children by a former marriage dependent upon him for support.

Such evidence is inadmissible where the non-support of the wife, as in this case, *was total.*

(2) The second instruction asked by the accused and refused by the court amounts to this: that a husband cannot be found guilty of non-support of his wife when, after a separation between them, caused by his misconduct, the wife takes service and supports herself. In other words, that such action on the part of the wife operates a condonement of the offense. To state the proposition is to answer it.

(3) The last instruction, which the court also refused, told the jury "that if they believed from the evidence that the wife . . . caused this indictment to be made because of her ill-will and hatred for her husband, and not because of his alleged desertion and neglect, then they must find for the defendant not guilty."

There is no evidence to sustain this instruction; but, if there had been, this is a prosecution by the Commonwealth against the accused for violation of the criminal law of the State, and whatever motive may have actuated the wife to testify against him is immaterial.

In any view of the case, the judgment is plainly right and must be affirmed.

Affirmed.

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Staunton

MORGAN v. COMMONWEALTH.

September 11, 1913.

1. APPEAL AND ERROR—*Refusal of Writ—Amended Petition.*—Where a petition for a writ of error has been rejected by this court on the ground that the judgment complained of is plainly right, and the order of rejection so states, no amended or other petition therein can afterwards be entertained. The court is without jurisdiction to entertain any other petition with respect to it. Such is the mandate of section 3466 of the Code.

Error to a judgment of the Circuit Court of Wise county.

Writ Refused.

Bond & Bruce, for the plaintiff in error.

BY THE COURT.

Morgan was indicted before the circuit court of Wise county for malicious shooting and was sentenced to four years' confinement in the penitentiary. He filed his petition asking for a writ of error from this court, and praying that a new trial be awarded him. This petition was considered by this court at its session in Wytheville on the 16th day of June, 1913; and the court being of opinion that the said judgment was plainly right, refused the said petition and affirmed the judgment. See abstract of judgment of this court filed with the record.

By section 3466 of the Code it is provided, among other things, that when the court of appeals "shall deem the

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judgment, decree or order complained of plainly right, and shall reject the petition on that ground, and the order of rejection so states, no other petition therein shall afterwards be entertained. But the rejection of such petition by a judge in vacation shall not prevent the presentation of such petition to the court at its next term."

The case before us comes clearly within the operation of the statute. The court, as appears from its order, deemed the judgment complained of plainly right and rejected the petition on that ground, and the order of rejection so states; therefore, this court has no jurisdiction to entertain any other petition with respect to it, and the amended petition presented at this term of court is, for these reasons, rejected.

Refused.

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Syllabus.

Staunton

MULLINS v. COMMONWEALTH.

September 11, 1913.

Absent, Keith, P.

1. INDICTMENTS—*Sale of Liquor Without License—Allegation of Time—Surplusage.*—An indictment for unlawfully selling liquor without a license sufficiently charges the time of the sale when it charges that it was made "on the ..... day of ..... in the year one thousand, nine hundred and ..... and" within the last two years. The words quoted may be treated as surplusage, and what remains is a sufficient allegation of the time of the sale.
2. CRIMINAL LAW—*Plea—Demurrer and Replication Thereto—Effect.*—To a plea in abatement filed by a defendant in a criminal prosecution, the attorney for the Commonwealth may demur or reply, but he has no right to do both. If, after his demurrer is overruled, he replies to the plea, the demurrer will be treated as waived or withdrawn, although the prisoner objected to the filing of the replication and excepted to the ruling of the court overruling his objection.
3. GRAND JURY—*Presence of Attorney for Commonwealth.*—While it is the policy of the statute of this State (Code, section 3988) to keep the grand jury independent of all outside interference, and free and untrameled in their deliberations, and it is highly reprehensible for any attorney for the Commonwealth to violate in any degree either the terms or the policy of the statute, an indictment will not be quashed because the attorney for the Commonwealth appeared before the grand jury during their deliberation when not sworn as a witness, where it appears from the evidence that he did not advise them to find the indictment, did not know of their finding until the presentment was made, and was not in the room when they had under consideration or deliberation the indictment or the presentment upon which the indictment was found.

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4. INTOXICATING LIQUORS—*Indictment for Selling Whiskey—Proof of Sale of "Corn Liquor."*—An indictment for illegally selling without license "whiskey," brandy, wine, beer, malt liquors, and mixtures thereof" is sufficiently sustained by proof of such sale of "corn liquor" in the absence of any adverse testimony. It is a matter of common knowledge that the term "corn whiskey" and "corn liquor" are used interchangeably, alternately and indifferently, and, upon proof of a sale of "corn liquor," the jury have the right to assume that it is of that class which is alcoholic or spiritous, distilled from corn, and comes within the terms of the statute prohibiting the sale of whiskey.

5. COURTS—*Jurisdiction—Violation of Revenue Laws—Sale of Liquor in Local Option Territory—Dickenson County.*—An indictment for unlawfully selling ardent spirits in Dickenson county, without a license so to do, is an offense against the revenue laws of the State of which the circuit court of said county has concurrent jurisdiction with the justices of the peace of said county, although no license for such sale could be granted in said county.

Error to a judgment of the Circuit Court of Dickenson county.

Affirmed.

The opinion states the case.

Sutherland & Sutherland, for the plaintiff in error.

Samuel W. Williams, Attorney General, for the Commonwealth.

CARDWELL, J., delivered the opinion of the court.

The refusal of the trial court to sustain the demurrer to the indictment is assigned as error.

The indictment was found and returned into court on July 16, 1912, and sets forth "that Melvin Mullins on the .....day of....., in the year one thousand nine hundred and.....and within the last two years in said county, did unlawfully sell by retail whiskey, brandy, wine, beer, malt liquors and mixtures thereof

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without a license so to do, as required by law, against the peace and dignity of the Commonwealth."

It is contended on behalf of the accused that the averment in the indictment as to the time when the offense was committed is meaningless, and that it does not charge the date of the sale nor such facts as show that the sale was made within two years prior to the indictment, the statutory period for the prosecution of such offenses.

In the recent case of *Shiflett* v. *Commonwealth,* 114 Va. 876, 77 S. E. 606, the charge in the indictment was "that Marcus Shiflett, within twelve months, on the last preceding 191.., in said county, did unlawfully sell ardent spirits without having obtained license to do so," &c., and the opinion of the court by Buchanan, J., citing ample authority for the ruling, holds that "words in an indictment which are meaningless may be treated as surplusage and rejected if the indictment is thereby made sensible. Courts of justice are disposed to treat as surplusage all erroneous and improper averments in complaints and indictments where the residue of the allegations sets out the offense charged in technical language and with substantial certainty and precision; that after rejecting the words 'on the last preceding 191..,' following the words 'within twelve months,' as meaningless, the indictment stated that the grand jury attending the circuit court of Greene county, at its December term, 1912, upon their oath, present that Marcus Shiflett within twelve months, . . . in the said county, did unlawfully sell ardent spirits without having a license to do so, which were apt and sufficient words to show that the offense charged was committed within the statutory period, and, therefore, the demurrer to the indictment was properly overruled."

So, in the case now before us, after rejecting as surplusage, and because meaningless, the words in the indictment, "on the.....day of.....in the year one

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thousand nine hundred and.....and," the residue of the allegations, in apt and sufficient words, set out the offense charged against the accused "in technical language and with substantial certainty and precision," showing that the offense charged was committed within the statutory period, and the demurrer to the indictment was rightly overruled.

When the case was called for trial the accused, Melvin Mullins, tendered his plea in abatement to the indictment to the effect that "the grand jury that found and returned the indictment was an illegal body, and the deliberations of said body in returning said indictment was contrary to law for this, to-wit: W. G. L. Long, the attorney for the Commonwealth, after the grand jury was sworn and retired to their room to deliberate on the said indictment, went before the said grand jury during their deliberation, and the said attorney for the Commonwealth was not at the time he went before the said grand jury, and while they were deliberating on this indictment, duly sworn to testify as a witness before the said grand jury, and by reason of the illegal conduct of the said attorney for the Commonwealth and of the said grand jury this defendant has been injured and prejudiced, and said indictment returned . . . Wherefore, for the reason that the attorney for the Commonwealth was before said grand jury at the time and under the circumstances aforesaid, he prays judgment of said indictment that the same be quashed."

The attorney for the Commonwealth demurred to said plea and the accused joined in the demurrer, which the court overruled; and thereupon the attorney for the Commonwealth offered to reply to the said plea, to which the accused objected, because he (the attorney for the Commonwealth) had demurred, and he was only allowed one answer to said plea; but the court overruled said objec-

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tion and permitted the attorney for the Commonwealth to reply to the plea, to which action and ruling of the court the accused then and there excepted; whereupon the accused joined in said replication and issue was joined thereon, which issue was, by consent of parties, tried by the court without the intervention of a jury, and to sustain in his behalf the issue on the plea the accused called as his witness the attorney for the Commonwealth, who, after being sworn, testified as follows:

"After the grand jury was sworn and retired to their room for deliberation, I went in and was in the grand jury room at the July term of this court, the term at which this indictment was found, several times. I was called in there by the grand jury to consult and was not called as a witness; the grand jury was in session, and it was during their deliberation when I was in there.

"I did not advise the grand jury to return this indictment against the defendant, and did not know of it until the presentment was made, and was not in the room when the jury had under consideration or deliberation of said indictment or the presentment upon which said indictment was found."

This being all the evidence introduced in support of the said plea, the court, finding that the evidence did not sustain the plea, overruled it and gave judgment *respondeat ouster,* to which ruling the accused then and there excepted.

The contention of the accused is that when the demurrer to the plea in abatement was overruled, judgment should have been entered for the accused; that the Commonwealth's Attorney should not have been permitted to have two answers to the same plea, and having demurred to the plea, he was not entitled to reply to it.

There is no merit in this contention. It is true that while the attorney for the Commonwealth had the right

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to demur or reply to the plea, he had no right to do both; but as said in the opinion of this court in *Ches., &c., R. Co.* v. *Bank,* 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449, "Although the record does not show that the demurrer was withdrawn, the court and parties must have so considered it, otherwise the replication could not have been filed and a trial had upon the issue of fact raised by it. The demurrer having been treated in the trial court as waived or withdrawn, it must be so considered here."

We are of opinion that the trial court did not err in overruling the accused's plea in abatement or in refusing to quash the indictment.

Section 3988 of the Code of 1904 does declare it unlawful for any attorney for the Commonwealth to go before any grand jury during their deliberations, except when duly sworn to testify as a witness, with the qualification that "he may advise the foreman of the grand jury or any members thereof in relation to the discharge of their duties." It is unquestionably the policy of the statute, as has been the practice in this jurisdiction, to keep the grand jury independent of all outside interference, free and untrammeled in their deliberations, and while it is highly reprehensible for any attorney for the Commonwealth to violate in any degree either the terms or the policy of the statute, it would be a strained construction of it, upon the facts in this case, to say that there has been such a disregard thereof as was or might have been injurious and prejudicial to the accused and calling for a dismissal of the indictment against him, upon the ground that it was returned by the grand jury because the attorney for the Commonwealth went before the grand jury while they were in session at the July term of the court, 1912, at which term this indictment was found and returned into court. It will be observed that the attorney for the Commonwealth, introduced as a witness for the accused, testified: "I did not advise

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the grand jury to return this indictment against the defendant, and did not know of it until the presentment was made, and was not in the room when the jury had under consideration or deliberation of said indictment or the presentment upon which said indictment was found."

The remaining assignment of error requiring consideration relates to the ruling of the trial court refusing to set aside the verdict of the jury because the same was without evidence to support it, and its refusal to dismiss the case because the court was without jurisdiction to try it.

The only evidence in the case is that given by A. K. Lambert, introduced as a witness on behalf of the Commonwealth, who testified that in June, 1911, he was coming from McClure and wanted some liquor, and he came to a place on Crane's Nest, in Dickenson county, and asked a woman, whom he did not know, where the man of the house was, and she said he was up at the barn, which was about fifty yards from the house. "I went up there and the defendant, Melvin Mullins, was up there. I knew him well. I told him I wanted a fruit jar and he said perhaps he could get one at the house. We went to the house and we went into the main room, where I stopped, and he and his wife went into the kitchen and he came back in a few moments. Then I went into the kitchen and on the table set a half gallon or liquor. I laid down $2.20, and picked up the can and left. The can had corn liquor in it. . . . I saw the defendant, his wife and some others there; I don't know who they were; I took it they were their children. . . . I do not recall seeing any grown people there except the defendant and his wife. I did not stay but a few minutes, and was never there before or after I left the $2.00 there for the liquor and the 20 cents for the can; I do not know who got the money, or whether anyone got it or not. I did not tell anyone where I put the money, but it was on the table in the kitchen where I found the liquor."

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The only point made as to the insufficiency of this evidence to warrant the jury in finding the accused guilty of selling "whiskey, brandy, wine, beer, malt liquors and mixtures thereof without a license so to do, as required by law," is that proof of a sale of "corn liquor" is not a proof of a sale of "whiskey," &c., in violation of the statute. To sustain this contention two cases are cited: *Barker* v. *State,* 117 Ga. 428, 43 S. E. 744, and *Donithan* v. *Commonwealth,* 109 Va. 845, 64 S. E. 1050. In the first named case the court was construing a certain section of the Penal Code of Georgia, and merely held that, as the sale of corn whiskey was not prohibited by that section under which the defendant was indicted, the verdict of the jury finding him guilty of a sale of corn whiskey should have been set aside.

In *Donithan's Case, supra,* the indictment was for the unlawful sale of "spiritous and malt liquors, whiskey, brandy, wine, ale, beer or mixtures thereof," and the ruling of this court was that as cider is not a spiritous liquor and does not belong to any of the other classes enumerated in the statute, therefore the verdict of the jury finding the defendant guilty upon proof only of the sale of cider which produced intoxication could not be sustained.

In the case at bar the witness speaks of the article purchased by him of the accused as "corn liquor." The term "liquor" in its limited sense and in its more common application implies spiritous fluids, whether fermented or distilled, such as brandy, whiskey, gin, beer and wine, and the like fluids in great variety; so that where a witness in describing what liquor had been sold uniformly describes it merely as "liquor" it would be proper for the jury to assume that he was speaking of that class of liquor specifically referred to in the second definition given by Webster, viz., 'alcoholic or spiritous fluid either distilled or fermented; as brandy, wine, whiskey, beer," etc. 5 W. & P. 4181-82, and authorities there cited.

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Whiskey is a spirit distilled from grain, barley maize, (corn), wheat, rye, etc., and the use of the term "whiskey" in an indictment charging the defendant with selling intoxicating liquor, to-wit, one quart of whiskey, is sufficient to show the sale of fermented or distilled liquor, within the meaning of a statute prohibiting the sale of such liquor. 5 W. & P. 7445, and authorities cited.

In *State* v. *Williamson,* 21 Mo. 498, the opinion of the court says: "The court will take judicial notice that *whiskey* is a spirit distilled from corn." And in *Aston* v. *State* (Texas Crim. 1899), 49 S. W. 385, the court said: "It is common information that *whiskey* is a spiritous liquor distilled from corn and vegetables, and is highly intoxicating."

In *Com.* v. *White,* 10 Met. (Mass.) 14, the indictment was under the Rev. Statutes of Massachusetts and charged the defendant with selling "one gill of spiritous liquor," etc. The proof was that the liquor sold was in the form of gin and brandy mixed with sugar and water, so as to make what was called *toddy* or *sling,* the objection taken being that the proof did not show a sale of spiritous liquor, but only a sale of mixed liquor, part of which was spiritous. *Held:* That the objection was not well taken, on the ground that, although the article sold might have been properly described as a mixed liquor, part of which was spiritous, it was also well described as spiritous liquor, and the proof adduced was sufficient to sustain a conviction for a violation of the statute providing that "if any person shall sell any wine or spiritous liquor or any mixed liquor, part of which is spiritous . . . without being duly licensed . . . he shall forfeit for each offense twenty dollars." See also *Com.* v. *Morgan,* 149 Mass. 314, 21 N. E. 369.

In *State* v. *Brittain,* 89 N. C. 474, the opinion of the court says: "Most generally the term 'liquors' implies

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spiritous liquor," and it was, therefore, held that proof that the defendant sold liquors is sufficient to show, in the absence of adverse testimony, that he sold spiritous liquors.

It is a matter of common knowledge that "corn whiskey" and "corn liquor," or "rye liquor" and "rye whiskey," are terms interchangeably, alternately and indifferently used, respectively, to indicate the grain out of which the liquor spoken of was distilled; so that when the witness in this case spoke uniformly of the contents of the can he purchased of the accused as "corn liquor" it was entirely proper for the jury to assume that he was speaking of that class of liquor which is alcoholic or spiritous, distilled from corn, and which comes within the terms of the statute prohibiting the sale of whiskey, etc., without being duly licensed to do so, and it was not error in the court to refuse to set aside the jury's verdict finding the accused guilty as charged in the indictment and imposing upon him the punishment authorized by the statute.

The ground upon which the contention is made by the accused that the trial court was without jurisdiction to try him for the offense charged in the indictment is that the general revenue laws and what is known as the "Byrd Liquor Law" do not apply to the county of Dickenson for the reason that the act of the legislature approved March 12, 1902 (Acts 1901-2, p. 321), was still in force, and provides in substance, that no license shall be granted for the sale of ardent spirits, either by wholesale or retail, in certain named counties, including Dickenson. In other words, the contention is that in the counties named in the act of 1901-2 the general revenue laws are not in force and that there can be no prosecution for a violation thereof in this case, but that if the accused has been guilty of the illegal sale of liquor in the county of Dickenson he can only be prosecuted and punished for the offense under the

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said act prohibiting the granting of a license to sell ardent spirits in that county, which is a misdemeanor of which the justices of the peace in the county have sole and exclusive jurisdiction.

The conditions created by this special statute in the counties to which it applies are practically the same that result in any county in which, under the local option laws, a local option election has been held and the vote has resulted in favor of local option; that is, in favor of prohibiting the licensing of the sale of ardent spirits in the county or locality in which the election was held.

In *Fletcher* v. *Com'th.*, 106 Va. 840, 56 S. E. 149, substantially the same contention was made for the accused as is made in this case, viz., that the county of Warren, having voted in favor of local option, and the indictment charging the defendant, Fletcher, with a violation of the general revenue laws, and with selling intoxicating liquors unlawfully in said county, the circuit court was without jurisdiction to try the case, for the reason that there could be no violation of the revenue laws in any county in which a license to sell ardent spirits could not be lawfully granted; that is, the indictment did not charge a violation of the revenue laws within the meaning of the statute conferring jurisdiction upon the circuit courts to try and determine that class of cases. In the opinion of the court by Keith, P., in that case, after stating the facts, it is said:

"We do not perceive that the character and nature of the offense charged is affected by the fact that it was committed in a local option district. The charge is that the defendant did 'unlawfully sell and deliver intoxicating liquors.' If he did it unlawfully, whether with or without a license, he was guilty of an offense against the law. That he also violated the local option law can have no influence upon the nature of the act. *Webster's Case,* 89 Va. 154, 15 S. E. 513. He has done that which the law says he shall

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not do without having first obtained a license, and it does not lie in his mouth to say: 'It is true I did not have a license, but the act was committed in a local option district where it was impossible under the law to obtain a license.'

"It was forcibly urged by the Attorney-General that no reason of public policy can be suggested why the court should be given jurisdiction of the offense of unlawful sale of intoxicating liquors where the sale takes place in a district where such traffic may be licensed and denied such jurisdiction where committed in local option territory, and we concur with him in the view expressed, that the unlawful sale of liquor in a local option district is 'a more serious offense, more injurious to public morals, and a graver infraction of civic duty than a sale in a license district without a license, for it is both a violation of the revenue law (that is, it is the conduct of a business free from any burden of taxation, which can be legally conducted only upon paying the taxes imposed upon it, and which others lawfully engaged in it pay), and it is a sale also in flagrant defiance of the law, sanctioned by the votes of a majority of the qualified voters of the community, which prohibits any such traffic, and not only makes it illegal, but criminal.'

"We are of opinion that the offense against the Commonwealth here charged consists in the unlawful sale of intoxicating liquors; that it is none the less a violation of the revenue laws of the Commonwealth because it happens that the offense charged was committed in a local option district; and it follows, therefore, that the circuit court has concurrent jurisdiction with the justices of the peace for the trial of such offenses."

This case cannot be differentiated from the Fletcher case. In this case the special act so much relied on by the accused as taking from the circuit court of Dickenson county jurisdiction to try and determine cases of violation of the

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revenue laws, itself *proprio vigore* prevents the licensing of the sale of ardent spirits in said county, and brought about exactly the same condition in that county as existed in Warren county when Fletcher was indicted and convicted for selling ardent spirits without a license so to do; therefore, the principle resting upon authority and sound reasoning applied to the Fletcher case is equally applicable to this and controls it.

The judgment of the circuit court here complained of is affirmed.

Affirmed.

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Richmond

E. C. GAYLE AND J. H. EASON v. COMMONWEALTH.

January 15, 1914.

1. CRIMINAL LAW—*Intoxicating Liquors—Sale Without License—Evidence—Analysis by Assistant State Chemist—Inadmissibility.*—On the trial of a person indicted under the "Byrd Liquor Law" for selling cider containing more than six *per cent.* of alcohol, without license, the certificate of the Assistant State Chemist of his analysis of the cider, verified by his affidavit, is not admissible in evidence. The official chemist of the agricultural department (namely, the State Chemist) is charged with the performance of numerous important and delicate duties in connection with that department, many of which call for personal action involving official responsibility and professional skill and which cannot be delegated. Of that class is the service imposed by section 24 of the law which is made the basis of a criminal prosecution, and the performance of which in the case at bar was attempted by the person styling himself "Assistant State Chemist."
2. CRIMINAL LAW—*"Byrd Liquor Law"—Strict Construction—Evidence.* The "Byrd Liquor Law" is a highly penal statute, and is not to be extended by implication, and the evidence upon which a conviction under it may be had is an innovation on the general law and must be strictly construed.
3. STATUTES—*Constitutionality.*—The constitutionality of a statute will not be determined in any case unless it is absolutely necessary.

Error to a judgment of the Circuit Court of the city of Suffolk.

Reversed.

The opinion states the case.

Jno. N. Sebrell, for the plaintiff in error.

Samuel W. Williams, Attorney General, and *Richard B. Davis, Assistant Attorney General,* for the Commonwealth.

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WHITTLE, J., delivered the opinion of the court.

The plaintiffs in error, who were retail grocers in Suffolk, were fined $50 each by the mayor of that city for the alleged violation of section 14 of an act approved March 12, 1908, commonly known as the "Byrd Liquor Law" (3 Va. Code, p. 766), which forbids the sale of cider containing more than six *per cent.* of alcohol in local option territory and where no license to sell ardent spirits by retail has been granted. Upon appeal to the circuit court, the judgment of the Mayor was affirmed, which judgment we are asked to review.

Over the objection of the accused, the fact that the cider sold by them contained more than six *per cent.* of alcohol was sought to be shown by an analysis of C. M. Bradbury, styling himself "Assistant State Chemist," verified by his affidavit made before a notary public in the city of Richmond.

The prosecution relies upon section 24 of the act as authority for the admissibility of the before-mentioned analysis, certificate and affidavit as evidence. The section reads as follows:

"It shall be the duty of the State Commissioner of Agriculture, at the written request of any officer, State, county or municipal, charged with the execution of the revenue laws, to cause to be analyzed any mixture supposed to contain alcohol and to return to the officer making the request a certificate of the chemist showing such analysis. The certificate of the chemist or agricultural department of the State, when signed and sworn to by him, shall be evidence in all prosecutions under the revenue laws of the State and in all controversies touching the mixture analyzed by him, but the burden shall be upon the prosecution to establish the fact that the mixture analyzed is the same as that alleged to have been illicitly sold, but, upon the

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motion of the accused, the chemist shall be required to appear as witness and shall be subject to cross-examination."

The essential provisions of this section were wholly disregarded. As we have seen, the act comtemplates that on written request of any officer charged with the execution of the revenue laws, the State Commissioner of Agriculture shall cause the analysis to be made by the chemist in his department (namely, the State Chemist) and shall return the certificate of the chemist showing such analysis to the officer making the request. There was no such written request made to the Commissioner of Agriculture, and no return by him of the certificate of the State Chemist showing the analysis; but, to the contrary, the head of the agricultural department of the State, specially charged with the supervision, custody and return of the analysis, was entirely ignored. Moreover, the analysis, certificate and return were made by an unauthorized person, the Assistant State Chemist, and in an unauthorized manner. The official chemist of the agricultural department is selected and appointed by the Commissioner of Agriculture (Code, sec. 1787), and charged with the performance of numerous important and delicate duties in connection with that department, many of which call for personal action involving official responsibility and professional skill, and which cannot be delegated. Of that class is the service imposed by section 24, which is made the basis of a criminal prosecution.

The statute is in a high degree penal, and the evidence upon which a conviction under it may be had is an innovation on the general law and must be strictly construed. *Harris* v. *Com'th.*, 81 Va. 240, 59 Am. Rep. 666; *Street* v. *Broaddus,* 96 Va. 823, 32 S. E. 466; *Gates* v. *City of Richmond,* 103 Va. 702, 49 S. E. 965.

Keith, P., in *Street* v. *Broaddus, supra,* says: "This statute is highly penal in its nature. It is not to be ex-

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tended by implication, but he who seeks to avail himself of the ruinous penalties which it imposes must bring himself strictly within its terms:"

The same principle is announced with convincing force and clearness by Marshall, C. J., in *United States* v. *Wiltberger,* 5 Wheat. 76, 5 L. Ed. 37.

In this instance, without invoking the rule of strict construction, it is obvious that the prosecution has failed to bring the case within the statutory requirement.

It was also pressed upon us in argument that the section of the act authorizing a conviction on the chemist's certificate of the analysis of the cider verified by affidavit is violative of that part of Article 1, sec. 8, of the Bill of Rights, which declares "that in all criminal prosecutions a man hath a right . . . to be confronted with the accusers and witnesses . . ." Inasmuch, however, as the case made by the Commonwealth does not come within the terms of the act and the judgment must be reversed on that ground, its constitutionality is not now an issue. And it is a well settled general rule that the constitutionality of a statute will not be determined in any case unless it is absolutely necessary. Cooley's Const. Lim. (7th ed.) 231; 8 Cyc. 789, and cases cited.

For the foregoing reasons the judgment of the circuit court must be reversed and the case remanded for further proceedings, to be had therein not in conflict with the views expressed in this opinion.

Reversed.

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Richmond

LEWIS v. COMMONWEALTH.

January 15, 1914.

1. CRIMINAL LAW—*Gaming—Code, Section 3815—A, B, C and E. O. Tables—Like Tables—Crap Table.*—On a warrant charging that the defendant "did unlawfully keep and exhibit a certain gaming table called crap table, which said device is in nature of A, B, C and E. O. table, which said game was played with dice, against the peace and dignity of the Commonwealth of Virginia," there can be no conviction where there is no evidence that "crap" is a game of like kind with an A, B, C, or E. O. table. Section 3815 of the Code, under which conviction is sought, does not forbid the game of "crap" *eo nomine*, and if the evidence does not show that it is a game of like kind with those named in the warrant there can be no conviction. If the warrant had followed the statute and enumerated all of the games to which it refers, it is not decided whether the same standard would be applied in determining whether "crap" is within the games prohibited by the statute.

Error to a judgment of the Circuit Court of Norfolk county.

Reversed.

The opinion states the case.

N. T. Green, for the plaintiff in error.

Samuel W. Williams, Attorney General, and *Richard B. Davis, Assistant Attorney General,* for the Commonwealth.

KEITH, P., delivered the opinion of the court.

Lewis was arrested on a warrant charging him with violating section 3815 of the Code of Virginia, found guilty

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and fined by the justice of the peace one hundred dollars. From this judgment he took an appeal to the circuit court of Norfolk county, which was tried before a jury, and a verdict and judgment rendered by them of guilty, as charged in the warrant, and fixing his punishment at a fine of five hundred dollars and confinement in jail for three months. To this judgment a writ of error was awarded by one of the judges of this court.

The statute under which he was prosecuted, section 3815 of the Code, is as follows:

"If any person keep or exhibit a gaming table commonly called A, B, C, or E. O. table, faro bank, wheel of fortune, keno table, or table of the like kind, under any denomination, whether the game or table be played with cards, dice, or otherwise, or be a partner, or concerned in interest in the keeping or exhibiting such table or bank, he shall be confined in jail not less than two nor more than twelve months, and fined not less than one hundred nor more than oue thousand dollars." The residue of the section need not now be considered.

In the statute as it appears in the Code of 1860, the only games enumerated were A, B, C, and E. O. tables, or faro bank. By the act of the 4th of April, 1861, the act was amended by inserting keno table, and by an act approved 14th of March, 1878, statute was further amended by inserting, among the other prohibited games, wheel of fortune, so as to make the statute read as it now appears in the Code of 1904.

In the case before us the warrant charges that John T. Lewis "did unlawfully keep and exhibit a certain gaming table called crap table, which said device is in nature of A, B, C, and E. O. table, which said game was played with dice, against the peace and dignity of the Commonwealth of Virginia." All the games enumerated in the statute are not mentioned in the warrant; the faro bank,

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wheel of fortune and keno table are omitted; so that to constitute an offense under the statute, the proof under this warrant must be that the game of crap is of a like kind with the games enumerated in the warrant, to-wit, A, B, C, and E. O. table. The game of crap is not one of the enumerated games forbidden, and to play or exhibit it does not constitute an offense under section 3815, unless it be a game of like kind with those named in the warrant under which the trial took place.

In order to determine whether crap is a game of like kind with an A, B, C, or E. O. table, we must know something about those games, and the record is silent with respect to them. How are we to say that the game of crap is one of like kind with an A, B, C, or E. O. table when there is no evidence as to the nature and character of an A, B, C, or E. O. table, or as to how those games are played or exhibited? Upon the evidence before the court, if the defendant was guilty of any offense, it was exhibiting the game of crap, but the statute does not forbid the game of crap *eo nomine,* and the evidence does not show that it is a game of like kind with those named in the warrant and forbidden by the statute. If the warrant had followed the statute and enumerated all the games to which it refers, we are not prepared to say that the only standard to be used in determining whether or not the game of crap is a game of like kind with those enumerated in the statute is that the chances of the game are unequal, all other things being equal, and those unequal chances are in favor of the exhibitor of the game, for in some of these enumerated games it would seem that as between the player and the exhibitor, he not participating in the game, the element of chance was wholly eliminated, and as between the players themselves the chances were equal, while the exhibitor had no other interest in the game than the percentage which he deducted from the amount contributed by the players.

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(See *Wyatt's Case*, 5 Rand. [27 Va.] 694.) To this class belongs the game of keno and the wheel of fortune, and yet the playing or exhibiting of either of them is forbidden by section 3815.

We are of opinion that the judgment should be reversed and the case remanded to the circuit court to be further proceeded in.

Reversed.

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6. *Conflicting Evidence—Verdicts.*—Where the evidence in a case is conflicting and the case has been fairly submitted to the jury, under proper instructions from the trial court, the verdict of the jury, approved by the trial court, will not be disturbed by this court. *Nesbit* v. *Webb*, 362.
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16. *Instructions—Sufficiently Instructed.*—Where the instructions given by the court are sufficient to inform the jury as to the law applicable to the facts of the case, it is unnecessary for this court to review the action of the trial court in rejecting other instructions tendered. *Jacot* v. *Grossman Seed Co.*, 90.

17. *Objection Below—Personal Judgment.*—Where the only complaint of a defendant is that the judgment rendered against him is a personal judgment, but he took no exception to any of the rulings of the trial court, a writ of error

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awarded in his favor should be dismissed as having been improvidently awarded. *Bernard* v. *McClanahan*, 453.

18. *Objections for First Time—Case at Bar.*—Where it was agreed by counsel in the lower court that a bridge complained of was constructed "under legal authority" and the jury has been instructed, at the instance of the plaintiff, that the legal power of the defendant "to build the bridge in its present location is not an issue before them," the plaintiff will not be permitted to contend in this court for the first time that the bridge was built without legal authority. *Peck* v. *Hampton*, 855.

19. *Points Not Raised Below.*—Exceptions of every kind, when necessary at all, should be taken in the trial court. They cannot be taken for the first time in the appellate court. The appellate court can only review the case made and as made by the parties in the court below. If it were otherwise the appellate court would be converted into a court of original jurisdiction. *Norfolk & P. Co.* v. *Norfolk*, 169.

20. *Res Judicata—Second Appeal—Expression Not Necessary to First Decision.*—What was decided in a case pending on appeal is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law of the case and must control its disposition; but this rule does not apply to expressions of opinion on matters, the disposition of which was not required for the decision, and certainly not to matters which were neither mentioned nor necessary to be considered. *United States* v. *W. R. Trigg Co.*, 272.

21. *Two Trials Below—Look to Evidence on First Trial.*—Where there have been two trials of an action, the statute requires this court to look first to the evidence on the first trial, and if the trial court erred in setting aside the verdict on that trial, to set aside all proceedings subsequently to that verdict, and to enter up judgment thereon. *Reichenstein* v. *Va. Ry. & P. Co.*, 862.

22. *Two Trials Below—Refusal of Proper Instruction on First Trial—No Evidence at Second Trial.*—Where there have been two trials in the court below, and the record does not disclose on what ground the court set aside the first verdict, but does show that an instruction was asked for by the defendant, which should have been given, but was refused, which would of itself have been good ground for setting aside that verdict, and no evidence at all was offered on the second trial, and judgment was entered for the defendant, this court, on a writ of error, will affirm the judgment. *Reichenstein* v. *Va. Ry. & P. Co.*, 862.

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23. *Variance—Harmless Error—Code, Sections 3259 and 3260.*—Variance between the writ and the declaration is a matter of abatement only, and the objection cannot be raised for the first time in the appellate court. If the variance is occasioned by an amendment of the declaration at the bar, and is not taken advantage of by plea, motion or otherwise, and no motion is made for a continuance on account of such variance, and the case is heard and decided on the plea of the general issue, it is conclusively presumed that the amendment was harmless. Sections 3259 and 3260 of the Code with reference to pleas in abatement do apply and were intended to control in just such cases as this. *Ches. & O. R. Co.* v. *Chapman*, 32.

24. *Verdicts—Conflicting Evidence—Excessive Damages.*—Where the evidence in a case is conflicting, and the case has been fairly submitted to the jury under proper instructions from the court, and the case is heard in this court, as on a demurrer to the evidence by the plaintiff in error, the verdict of the jury will not be set aside as contrary to the evidence or for excessive damages where there is sufficient evidence to support the verdict. In such case the preponderance of the evidence cannot influence the action of the court in in considering a motion for a new trial. *Ches. & O. R. Co.* v. *Chapman*, 32.

25. *Verdicts—Conflict of Evidence—Plaintiff in Error.*—Where the evidence is conflicting the verdict of the jury settles the conflict, and the plaintiff in error occupies the position of a demurrant to the evidence. *Ches. & O. R. Co.* v. *Swartz*, 723.

26. *Verdict—Conflict of Evidence.*—Where the evidence is conflicting on a question of fact submitted to a jury, their verdict will not be disturbed on appeal. *Honaker* v. *Shrader*, 318.

27. *Verdict Contrary to Evidence—Evidence Not Certified.*—In the absence of the evidence, this court cannot reverse the ruling of the trial court setting aside a verdict as contrary to the law and the evidence. Although it appears from the record that the sole ground relied on by the defendants for setting aside the verdict was that the court permitted counsel for the plaintiff to refer to a section of the Code which had no possible bearing on the case; yet, where it does not appear what reasons may have controlled the court's action this assignment of error cannot be passed upon when the evidence in the case is not certified. *Lemons* v. *Harris*, 809.

28. *Verdicts—Plainly Wrong—Wills.*—Where the mental capacity of a testator is involved on the trial of an issue *devisavit vel non*, the jury are the proper judges of the weight and

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credit to be given to the testimony of the witnesses, and their verdict, when sanctioned, as in the case at bar, by the trial court, is entitled to the highest respect in the appellate court, but when there has been a plain and palpable deviation from the proof, interference on the part of the appellate court is warranted. *Huff* v. *Welch*, 74.

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See BILLS OF EXCEPTION, 2; COUNTIES, 4; CRIMINAL LAW, 2; DAMAGES, 4; EVIDENCE, 15; INSTRUCTIONS, 3, 4; NEW TRIAL, 1; PLEADING, 7; WITNESSES, 3.

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ASSIGNMENTS.

1. *Partial Assignment—Deed of Trust—How Action Brought.*—A deed of trust on a chose in action is an assignment *pro tanto* of the chose, and an action thereon in the name of the assignor for the benefit of himself and the creditor secured is properly brought. *Newton* v. *White*, 844.

See ACCOUNT, 1; CORPORATIONS, 2.

ASSUMPTION OF RISK. See CARRIERS, 7; NEGLIGENCE, 4; PLEADING, 5.

ATTACHMENTS.

1. *Affidavit—Sufficiency.*—Where it appears upon the face of the record that the affidavit for an attachment was unquestionably filed in the proper court by the proper officer, it

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will not be vitiated by a mere clerical error of the clerk who wrote it in not substituting the words "law and chancery" for "corporation" in the printed form used by him *Bernard* v. *McClanahan*, 453.

2. *Attachment for Rent—No Pending Action.*—The fact that the action at law referred to in the clerk's certificate to an attachment was never matured for hearing does not render an attachment for rent void, for the attachment is good as a remedy for the collection of rent to become due under a contract, whether there is an action at law to recover it or not, since the right to sue out an attachment for rent is not dependent upon a pending action at law to recover the same. *Bernard* v. *McClanahan*, 453.

3. *Order of Sale—Personal Judgment.*—An order in an attachment case which recites that it appears to the satisfaction of the court that the defendant is indebted to the plaintiff in a stated sum, and directs a sale of the attached effects, or so much thereof as may be necessary to pay the sum so stated, is not a personal judgment against the defendant, but reaches only the goods attached. *Bernard* v. *McClanahan*, 453.

See LANDLORD AND TENANT, 2.

BANKS AND BANKING. See CORPORATIONS, 3, 4; LIMITATION OF ACTIONS, 1, 2.

BILL OF PARTICULARS. See PLEADING, 6.

BILLS OF EXCEPTION.

1. *Bills of Exception—Contents—Excluding Answer of Witness.*—Where exception is taken to the ruling of the trial court refusing to permit a witness to answer a question, the bill of exception must show what answer was expected of the witness, else the appellate court cannot tell whether or not the witness had any knowledge on the subject or the question was relevant or material. The same rule applies to questions on cross-examination as to questions in chief. *Holladay* v. *Moore*, 66.

2. *Excluding Evidence—Answers Not Given.*—If the bill of exception to the action of the court in excluding answers to questions does not show what the answers would have been, it fails to disclose any prejudice to the exceptor. *Bowman* v. *First National Bank*, 463.

See APPEAL AND ERROR, 4, 17.

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BILLS AND NOTES.

1. *Endorsement — Release of Security — Renewals — Estoppel — Waiver.*—One who has repeatedly renewed his endorsement of a note after full knowledge that a part of the collateral put up by the maker with the original note had been withdrawn by him must be held to have waived that defense, and to be estopped from availing himself of it as to the renewal. *Lynch* v. *O'Brien*, 350.

See EVIDENCE, 31.

BOSS. See MASTER AND SERVANT, 1.

BOUNDARIES. See EVIDENCE, 4, 12.

BRIDGE. See COUNTIES, 1, 2, 3; NAVIGABLE WATERS, 1.

BROKERS.

1. *Commissions—Change of Price by Owner.*—If only one real estate broker is employed, and he contracts to furnish a purchaser of the land at a stipulated price, and he furnishes one whom the owner accepts, but in the negotiation the owner agrees upon and accepts a different price from that at which the agent was instructed to sell, such agent is entitled to his commission. *Cannon* v. *Bates*, 711.

2. *Commissions—Several Brokers—Ignorance of Each Other's Employment.*—Where two or more brokers are authorized to make a sale of land, but are ignorant of each other's employment, the broker who was the procuring cause of the sale is entitled to the commission. If such broker is the efficient cause of the sale, the fact that another broker or the owner of the land himself takes the matter in hand and completes the sale does not affect the right of such broker to the commission. Where two or more of such brokers have been endeavoring to bring about a sale which is formally consummated, each may have rendered meritorious services, without which that result would not have been reached. In such a case, a discrimination must be made between them to ascertain whose services must be deemed to be the efficient and effective cause of the sale. *Cannon* v. *Bates*, 711.

3. *Commissions—Several Brokers—Knowledge of Each Other's Employment.*—If two or more brokers are employed to sell the same land, and they know of each other's employment, and one of them is not more favored than another by the principal, the owner may sell to the purchaser who is first produced, and the broker producing such purchaser is entitled to the commmission. *Cannon* v. *Bates*, 711.

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4. *Real Estate Agents—Commissions—Completed Sale—Release by Vendor.*—If a real estate agent or broker, in pursuance of his contract with a land owner, has found a purchaser ready and willing to comply with the vendor's terms, and has brought the parties together, and they have entered into a valid contract of sale which the vendor can enforce and the sale has been completed so far as the agent is concerned, he cannot be deprived of his compensation by the voluntary release of the vendee and refusal of the vendor to consummate the sale, without the assent of the agent. So likewise, the vendor is liable to the agent for his compensation if, without the latter's consent, he release the vendee rather than incur the expense or annoyance or delay of litigation. *Middle Atl. Im. Co. v. Ardan*, 148.

5. *Real Estate Agents—Commissions—Failure to Sue Vendee—Advice of Counsel.*—In order to excuse a vendor from bringing suit against his vendee to enforce a contract for the sale of real estate and relieve himself from his obligation to pay his broker's commission, it is not sufficient for him, when sued for the commission, to prove that he was advised by his counsel that such a suit would be expensive and useless, but all the facts obtainable upon that question should be laid before the jury, and if as a result it should be made to appear that a suit would have been unavailing, the vendor will be excused for declining to institute it, as the law does not compel a man to do a vain and useless thing. *Middle Atl. Im. Co.* v. *Ardan*, 148.

6. *Real Estate Agents—Commissions—Representation of Solvency by Broker.*—Where a vendor of land is not influenced by the misrepresentations of his broker as to the financial condition of his vendee, such misrepresentations do not constitute a ground for refusing to pay the broker's commission, but the rule is otherwise where the vendor has no knowledge of the financial condition of the vendee and relies upon the representation of the broker that the vendee is ready, able and willing to buy, and is financially responsible for his contracts, which representation is untrue. *Middle Atl. Im. Co.* v. *Ardan*, 148.

7. *Real Estate Agents—Commissions—Vendor Without Fault.*—A real estate agent or broker is not entitled to recover his commission for the sale of land where the whole fault of the miscarriage of the contract of sale was on the part of the purchaser, and the vendor was without fault in the premises. *Middle Atl. Im. Co.* v. *Ardan*, 148.

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CAPITAL. See TAXATION, 2, 3, 4, 5, 6.

CARRIERS.

1. *Assault on Passenger—Damages—Limit—Case at Bar.*—In an action by a passenger against a railroad company to recover damages for an assault committed by the conductor on a passenger, where the damages are laid in the declaration at $10,000, it is not error to instruct the jury that, in assessing the damages of the plaintiff, they shall "assess his damages at such sum as will compensate him for such physical injuries and mental sufferings, if any, as were occasioned by such assault, not exceeding the sum of $10,000 claimed in the declaration." The instruction is not amenable to the objection that it gave the jury to understand that there was no limit to the amount they might award except the $10,000 claimed in the declaration. *Southern R. Co.* v. *Grubbs*, 876.
2. *Case at Bar.*—It clearly appears from the evidence in the case at bar that nothing done or said by the plaintiff was intended to waive, or could have misled any reasonably prudent person into believing that it had waived, its right to demand and recover from the defendant all the unpaid freight and demurrage charges which it undertook and agreed to pay. *Citizens' Bank* v. *Norfolk & W. R. Co.*, 45.
3. *Demurrage—Interstate Shipments—Rules of Interstate Commerce Commission.*—The evidence in the case at bar shows that the demurrage sued for was on interstate shipments of coal and was based upon rules prescribed by the Interstate Commerce Commission. The cars were upon the terminal yards of the railway company at Norfolk, and the fact that those yards were six miles long and the cars were located at various points on them and not actually on the pier at Lambert's Point furnishes no reason why demurrage should not be paid on those cars for their detention while awaiting the convenience of the consignee or the arrival of the vessel into which they were to be unloaded. *Citizens' Bank* v. *Norfolk & W. R. Co.*, 45.
4. *Interstate Commerce—Special Contracts to Expedite Delivery of Interstate Shipments.*—A special contract with a particular shipper, whereby a carrier agrees for the published rate to expedite an interstate shipment of freight and deliver the same on a designated day, gives to the particular shipper an advantage over other shippers and makes a discrimination in his favor which is prohibited by the interstate commerce act, and hence such a contract is void. *Ches. & O. R. Co.* v. *Ruckman*, 493.

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5. *Notice to Agent—Estoppel.*—A principal who has directed a carrier to deliver shipments of coal to his agent, and has notice through such agent of the manner in which notice of coal shipments are given, and acquiesces therein during the period of the agency, cannot thereafter object to the sufficiency of the notice because not given in a different manner. *Citizens' Bank* v. *Norfolk & W. R. Co.*, 45.

6. *Passenger—Ceasing to Be Passenger—Assault by Conductor—Question for Jury.*—Whether or not a passenger who fails to pay a small extra sum demanded of him because he had not purchased a ticket has lost his rights as a passenger, and whether the conductor was justified in making a violent and injurious assault upon him, are questions for the jury to determine, upon all the facts and circumstances of the case, under proper instructions from the court. *Southern R. Co.* v. *Grubbs*, 876.

7. *Passengers—Mail Clerk—Assumption of Risk—Contributory Negligence.*—A mail clerk on a railway train occupies the position of a passenger. He does not assume the risk of the defective car in which he works, but, knowing of the defect, he is bound to use ordinary care for his own protection; and if in consequence of his failure to do so he is injured, he is guilty of contributory negligence, which will bar his recovery. *Virginian R. Co.* v. *Bell*, 429.

8. *Railroad Conductor—Conservator of Peace—Object of Section 1294-d (45) of Code.*—Section 1294-d, paragraph 45, of the Code, which constitutes the conductor of a railroad train a peace officer of the State, was never intended to release common carriers from the high and important duty resting upon them to diligently care for and protect their passengers. Its object was to increase their facility for affording the traveling public protection by making their conductors conservators of the peace. *Southern R. Co.* v. *Grubbs*, 876.

9. *Railroad Conductor—Functions—Peace Officer—When So Acting—Question for Jury.*—The functions of a conductor of a railroad train are primarily as a representative of the railroad company, and his duty to the passenger is the same as that of the company. His duties as conservator of the peace are merely incidental to his office of conductor. Neither he nor his company can make use of his incidental functions as a conservator of the peace as a pretext to shield themselves from liability for his wrongful and oppressive acts as conductor. Whether or not, in a given case, the conductor was, in fact and in good faith, acting in the capacity of conservator of the peace, and not in his capacity of conductor, is a question for the jury under all

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the facts and circumstances of the case, and if it is relied on to shield the company from liability the company must show the necessity and good faith of the transaction. *Southern R. Co.* v. *Grubbs*, 876.

See NEGLIGENCE, 6; RAILROADS, 7.

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CONSTITUTIONAL LAW.

1. *Care of Convicts—Police Power.*—It is the duty of the State in its sovereign capacity to provide for the custody, employment and maintenance of its convicts, and to this end it is impelled not only by public expediency, but by motives of humanity. Such employment is necessary, not alone that they may earn their support, but also for their discipline, health and contentment. In discharging these duties the State is exercising its police power. *Shenandoah Lime Co.* v. *Governor*, 865.
2. *Police Power.*—The police power of the State is not paramount to the Constitution, but its free exercise is never interfered with unless plainly in conflict with the higher law. *Shenandoah Lime Co.* v. *Governor*, 865.
3. *Convict Lime Grinding Act—Governmental Purpose—Appropriation of Funds—Due Process.*—The "convict lime grinding act," being a valid exercise by the State of its police power, the appropriation which the act carries, in order to put it into effect and carry out its provisions, is clearly for a public purpose and not for a private purpose. The inci-

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dental provision for the sale of the product resulting from the employment of the convicts does not affect the governmental purpose of the act. Any injury to private manufacturers of lime that may result from the incidental competition is not the effect of any unlawful discrimination against them within the prohibition of the fourteenth amendment of the Federal Constitution, but is *damnum absque injuria*. *Shenandoah Lime Co.* v. *Governor*, 865.

4. *Convict Lime Grinding Act—Validity—Dominant Purpose of Act—Incidental Purpose.*—It is apparent from the title, preamble and body of the "convict lime grinding act" that its dominant purpose is to provide suitable employment for certain long term or dangerous convicts confined in the penitentiary, and that the other provisions of the act are merely tributary to that end. The provisions of the act are clearly within the police power of the State, and do not conflict with the provisions of section 185 of the Constitution, which forbids the State becoming a party to or interested in "works of internal improvement," nor of section 188, forbidding the appropriation of public funds for private purposes, nor do such provisions amount to taking property of complainants without due process of law contrary to the fourteenth amendment of the Constitution of the United States. *Shenandoah Lime Co.* v. *Governor*, 865.

5. *Meaning of "Internal Improvements."*—The term "internal improvements" as used in the Constitution has acquired a definite and well recognized meaning in this State, and the framers of the Constitution must be presumed to have used it only in the definite sense that had attached to it throughout the history of the State. Its meanings as thus defined and understood throughout the legislation of the State, and the decisions of her courts, has included and had reference to the channels of trade and commerce, such as turnpikes, canals, railroads, telegraph lines, and, more recently, telephone lines, and other words of a like *quasi* public character. It was never intended to embrace such things as machinery for grinding lime by convicts and temporary structures to house them while so engaged. *Shenandoah Lime Co.* v. *Governor*, 865.

6. *Particular Trust—Diversion by Legislature.*—Private property donated by a testator to a well-defined valid trust cannot be diverted by the legislature to a distinctly different object. The legislature has no power to seize upon private property thus dedicated and appropriate it to a wholly different purpose, however meritorious such purpose may be, and legislation to that effect is unconstitutional and void. If

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the trust declared by the will is lawful, the beneficiaries have property rights in the trust subject which cannot be taken away from them by the legislature. If the trust is unlawful, the property belongs to the heirs of the testator, and is equally under the protection of the law. *General Board* v. *Robertson*, 527.

7. *Validity of Statute—Presumption.*—Every presumption is made in favor of the constitutionality of an act of the legislature. A reasonable doubt as to its constitutionality must be solved in favor of the validity of the law. The courts have nothing to do with the question whether or not it is wise and proper, as the legislature has plenary power except as restrained by the Constitution of the State or the United States, and it is only where a statute is plainly repugnant to a constitutional provision that the courts can declare it null and void. *Shenandoah Lime Co.* v. *Governor*, 865.

See STATUTES, 1.

CONSTRUCTION. See LANDLORD AND TENANT, 3.

CONTEMPT.

1. *Inability to Pay Money Judgment—Imprisonment.*—Where, in a proceeding for contempt, there is a decree for money against the defendant and also an order that unless the money be paid within a stated period the defendant shall be attached and confined in jail, the payment of the money in accordance with the terms of the decree, or inability upon the part of the defendant to pay it on account of poverty, insolvency, or other cause not attributable to any fault of his, should be taken as a satisfaction, and all further proceedings for contempt should be discontinued. *Camden* v. *Virginia Safe Dep. Co.*, 18.

2. *Insolvent Corporations—Receivers—Wrongful Disbursements by Agent of Corporation—Parties.*—Where a court of equity has appointed receivers of a corporation and directed them to take charge of all the assets of the corporation to be administered by the court, and the agent in charge of a branch of such corporation has been duly notified of the appointment of the receivers and of their duties in the premises, if such agent thereafter wrongfully pays over funds of which he was the custodian to a creditor of the corporation he is guilty of a contempt of court, and may be proceeded against therefor, although not a party to the suit in which the receivers were appointed. *Camden* v. *Virginia Safe Dep. Co.*, 18.

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CONTINUANCE. See PLEADING, 11.

CONTRACTS.

1. *Case at Bar—Powers of Assistant Engineer.*—Looking to the entire contract in suit, it cannot be said as a matter of law that the assistant engineer had no power to authorize the excavation of a trench wider than that set out in the contract and the specifications and the original profile. *Richmond* v. *Burton*, 206.
2. *Consideration—Promise—Landlord and Tenant.*—If a lessee contracts to erect buildings on the leased premises, and the lessor covenants that he will at the end of the lease take the buildings so to be erected at a fair valuation, this constitutes a promise by the lessor, supported by a valuable consideration, to pay the lessee for such buildings. *Newton* v. *White*, 844.
3. *Construction—Question for Court.*—Whether under a written contract, which is the ground for action, the defendant is primarily liable for the sum claimed, or merely guaranteed its payment, is a question for the court and not for the jury. *Citizens' Bank* v. *Norfolk & W. R. Co.*, 45.
4. *Enforcement—Illegal Consideration—Parties in Pari Delicto.*—Courts will not aid a party to enforce an agreement made in furtherance of objects forbidden by statute, the common law, or the general policy of the law, or to recover damages for its breach, or to recover back money paid under it when the agreement has been executed in whole or in part. If the parties are in *pari delicto* and one of them has performed the illegal agreement in whole or in part, he cannot recover from the other party that which he has parted with under the contract. The law simply leaves the litigants in the plight in which they have seen fit to place themselves without undertaking to balance benefits or burdens. If either derives a benefit from the transaction, it results from the act of the parties and not of the law. In its essence the doctrine is not founded upon the interest or supposed contractual rights of the parties. All such considerations are subordinated to the common weal, and in the eye of the law the contract confers no rights upon the parties. If property of the plaintiff is in the possession of the defendant and he is forced to rely upon the illegal contract in order to recover it, the law will extend him no aid. *Levy* v. *Davis*, 814.
5. *Engineer's Estimates—Finality.*—Under a contract for the construction of a sewer providing that the city engineer shall decide all questions and disputes of every nature relative

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to the construction, prosecution and fulfilment of the contract, and as to the character, amount and value of the work done and materials furnished, and that upon all such points his decision is to be final and conclusive on both parties, the parties are bound to abide by the decision of the engineer, although it be erroneous, unless it be clearly proved by a preponderance of the evidence that such decision was fraudulently made, or that such a gross mistake was made thereby as necessarily to imply bad faith on his part, or a plain failure to exercise an honest judgment. *Richmond* v. *Burton*, 206.

6. *Engineer's Estimates—Finality—Case at Bar.*—When all of the provisions of the construction agreement in the declaration mentioned are read and considered together, it seems clear that it was not intended that the monthly estimates of the engineer should be final and conclusive of the facts recited in them, or regarded as a final acceptance of the work mentioned in them. *Luck Construction Co.* v. *Russell Co.*, 335.

7. *Engineer's Estimates—Finality—Directions of Engineer—Case at Bar—Instructions.*—In an action on a contract which provided that the work was to be done in accordance with the specifications and conditions of the agreement between the parties and to the satisfatcion of the county of Russell and the engineer, the plaintiff asked the court to instruct the jury "that if you believe from the evidence that the plaintiff performed the work mentioned in the contract and specifications in evidence before you, according to the contract and specifications, *as directed by the engineer*, and offered the same to the defendant, through its agents and engineers, for acceptance, then you should find for the plaintiff, notwithstanding the contract provides that 'no work shall be regarded as accepted until the final acceptance of the whole work therein contracted for.'" The court modified this instruction by striking out the words italicised.

Held: The modification was clearly proper, and the instruction as given was as favorable to the plaintiff as it was entitled to have it. *Luck Construction Co.* v. *Russell Co.*, 335.

8. *Engineer's Estimates—Fraud—Mistake.*—The acts of engineers in supervising the performance of work under construction contracts are not binding upon either party when such acts have been induced by the fraud of the other party, or are the result of fraud or mistake on the part of the engineers so gross as to amount to fraud on the rights of the other party. *Luck Construction Co.* v. *Russell Co.*, 335.

9. *Extra Work—Case at Bar.*—The contract in suit, like all other contracts, must be read as a whole so as to give effect to

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all of its parts. So reading said contract, the word "extra" used in section 23, requiring that the "amount of such extra costs and expense shall be ascertained before the commencement of the work," has no reference to work arising out of and entirely independent of the contract (something not required in its performance), but is the equivalent of *additional* work which was required in the performance of the contract—not necessary to the performance of the contract, in the sense that the contract could not be carried out without it, but necessary in the sense that by means of it the contract could be more conveniently and beneficially performed in the interest of both parties. *Richmond* v. *Burton*, 206.

10. *Illegal—Consideration—Mutuality of Interest.*—When the evidence shows mutuality of interest on the part of buyer and seller with respect to the illegal use to be made of the property, there can be no recovery by the seller of either the property itself or the purchase price thereof. *Levy* v. *Davis*, 814.

11. *Illegal Consideration—When Admissible as a Defense.*—Although a plaintiff can make out his case without disclosing the illegal character of the contract in suit, the defendant will be permitted to set up such illegality as a defense whenever the court can see that to permit him to do so will defeat the object of the illegal transaction and promote the interest of society and the policy of the law. This is permitted for the public good and not out of any consideration for the defendant. *Levy* v. *Davis*, 814.

12. *Offer and Acceptance—Completed Contract.*—An option to purchase land cannot, without the consent of the vendor, be accepted on any other or different terms from those contained in the option. In the case in judgment, the option on one tract of land provided that the proposed purchaser should pay a stated price per acre for the land, and also reimburse the vendor for certain expenses that he would necessarily have to incur pending an option given by the same vendor to the same proposed purchaser on an entirely different and larger tract. These expenses the proposed purchaser refused to pay, and as the vendor had the right to fix his own terms in the option, and the vendee refused to accede to them, there was no completed contract between the parties for the sale and purchase of that tract of land. *Triplett* v. *Gudebrod*, 669.

13. *Rights of Third Persons—Marriage Settlement.*—If, in a marriage settlement by a husband upon his wife, the husband has failed to convey to his wife as large an estate in prop-

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erty as, before marriage, he had contracted to convey to her, or has conveyed the property to a trustee for the benefit of the wife and the children to be born of the marriage instead of to the wife only, these are not matters of which subsequent purchasers from the wife can complain. *Goodloe* v. *Woods*, 540.

See DAMAGES, 5; EVIDENCE, 21, 30; FRAUDS (STATUTE OF), 1, 2; FRAUD AND FRAUDULENT CONVEYANCES, 7; GUARANTY, 1; INJUNCTIONS, 4; MASTER AND SERVANT, 21; PRINCIPAL AND AGENT, 2; PRINCIPAL AND SURETY, 1; SALES, 4.

CONVICTS. See CONSTITUTIONAL LAW, 1, 3, 4.

CORN LIQUOR. See CRIMINAL LAW, 5.

CORPORATIONS.

1. *Stockholders—Creditors—Case in Judgment.*—The evidence, in the case in judgment, taken as a whole, shows that the appellant was a creditor of the appellee company and not a stockholder thereof. *Blunt* v. *Mercantile Railway Co.*, 6.
2. *Deed by Directors—Ratification—Case in Judgment.*—Although a bank is hopelessly insolvent, directors have not power to execute a general deed of asssignment of all its property for the equal benefit of all of its creditors. Such a deed can only be lawfully executed by the stockholders. If executed by the directors, however, though in excess of their authority, it is not wholly void, but is capable of being rendered valid by ratification or acquiescence, and, in the case in judgment, the whole course of dealing bearing upon the subject and the conduct of the litigation shows that the deed executed by the directors has been ratified and acquiesced in by the stockholders and the conduct of directors has been such as to estop them to deny its due execution. *Winston* v. *Gordon*, 899.
3. *Insolvency—Receivership—Equity Jurisdiction.*—As the directors of a banking corporation occupy towards its stockholders and creditors the relation of trustees, bound to the exercise of due care in the management of its affairs, and are liable for any negligence on their part resulting in an inadequacy of its assets to discharge its liabilities, they may, upon the threatened insolvency of the company, apply to a court of equity to take charge of its assets and so administer them as to diminish as far as possible the injury to all concerned, including creditors, depositors and stockholders. *Camden* v. *Virginia Safe Dep. Co.*, 18.
4. *Insolvency—Receivership—Suit by Directors—Dissolution.*—A bill filed by directors of a corporation, who are also stock-

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holders, for the sole purpose of collecting its assets and distributing them equitably amongst those entitled, is in no sense a bill to wind up the corporation. The result may be the application of all the assets of the corporation to the discharge of its liabilities, and its consequent inability to continue business, but neither insolvency nor the appointment of a receiver operates a dissolution of the corporation. A corporation may exist as a legal entity without any property or assets. *Camden* v. *Virginia Safe Dep. Co.*, 18.

5. *Organization Meeting—Absence of Subscriber—Waiver.*—If a subscriber to the stock of a corporation was not present or represented at the organization meeting, and did not waive in writing notice of the meeting, as provided by section 1105-a (4) of the Code (1904), his absence only rendered the proceedings voidable as to him, and he could subsequently waive the irregularity and ratify the proceedings, as was done in the case at bar. *Eichelberger* v. *Mann*, 774.

6. *Stock Subscription—Release—Agreement With Another Stockholder—Accord Without Satisfaction.*—An agreement to release a stockholder from his subscription upon certain conditions is not binding upon the company where it appears that the alleged agreement was not made with the stockholders as a whole, or with the board of directors, but with certain individual stockholders, acting upon their own initiative and without authority to release the subscriber from his stock subscription. A stockholder has no power to bind a corporation unless he is its authorized agent. In the case at bar, if any such agreement was made, it was not proved that it was performed by the subscriber, and an accord without satisfaction is not sufficient. *Eichelberger* v. *Mann*, 774.

7. *Stock Subscription—Release—Collateral Agreement With Third Person.*—It is no defense to a written subscription to stock in a corporation that the subscriber had a collateral agreement with two of the promoters of the corporation in their *individual* capacities only that under certain contingencies they would take the stock off his hands. Such a private arrangement between parties in their own behalf, concerning which neither the corporation nor other subscribers had notice, is in no way binding upon them. *Eichelberger* v. *Mann*, 774.

See CONTEMPT, 2; FRAUD AND FRAUDULENT CONVEYANCES, 2; INSURANCE, 6; STREET RAILWAYS, 2; TAXATION, 6.

COSTS.

1. Costs in trial courts are in the discretion of those courts and their action will not be reversed, except upon a clear showing of abuse. *Goodloe* v. *Woods*, 540.

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2. *Cost of Former Trial—Payment Before New Trial.*—If the costs of the former trial are paid before the new trial is had, that satisfies the requirement of the statute. *Lemons* v. *Harris*, 809.

3. *Public Officers.*—Costs ought not to be awarded against defendants to a suit who are public officers of the State, and have no personal interest in the litigation, and were represented by and acted under the advice of the Attorney-General. *General Board* v. *Robertson*, 527.

CO-TENANTS. See JOINT PROPERTY, 1.

COUNSEL FEES. See APPEAL AND ERROR, 7.

COUNTIES.

1. *Bridge Connecting City—Watchman—Ratification of Previous Appointment—Case at Bar.*—A county having agreed to pay one-half of the expenses of a watchman for a bridge connecting the county with an adjacent city, if it shall be deemed necessary by the council of the city to employ a watchman, the necessity for the employment of the watchman must be determined by the council before his employment. A resolution of the council passed years after the expense had been incurred is not sufficient. The fact that members of the council knew that the watchman was being employed is immaterial. A city council can only act at authorized meetings duly held, and not separately and individually. *Lynchburg* v. *Amherst County*, 600.

2. *Bridge Outside County—Power to Purchase and Maintain—Special Act.*—While a county has no power to expend money on the maintenance of a bridge outside of its territorial limits, yet where a special act authorizes a county and a city to purchase a bridge connecting the two, and "to determine and fix the terms and conditions on which the bridge was to be used," an agreement between them for the purchase of the bridge, and to make it a free bridge, and fixing the terms and conditions on which repairs are to be made, is not beyond the powers of the county. *Lynchburg* v. *Amherst County*, 600.

3. *Bridge Outside County—Repairs—Agreement With Joint Owner—Expenditures Not Authorized—Power to Pay.*—A county and a city having entered into an agreement, pursuant to a special act of Assembly, that the expense of keeping in repair a connecting bridge shall be borne by them equally, but also providing that repairs in excess of $100.00 at any one time shall be made as may from time to time be agreed

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on by the county and city, the county is not bound for repairs in excess of $100.00 at any one time made by the city without the consent and approval of the county. The county had no authority to expend any money on the bridge outside its territorial limits, except as conferred by the special act of Assembly and the agreement made in pursuance thereof, and its representatives are not only under no obligation to pay any part of the expense of repairs paid by the city not authorized by said agreement, but they have no authority to pay the same or any part thereof. *Lynchburg* v. *Amherst County*, 600.

4. *Boards of Supervisors—Disallowance of Claim—Appeal—Pleadings in Court.*—Sections 838 and 844 of the Code prescribe the manner by which claims against the county may be collected, and the county cannot be sued in any other manner; and while the method prescribed for litigating the rights of the parties as to claims disallowed by the board of supervisors is called an appeal, the action of the board is in no proper sense of the term an adjudication of the claim on its merits, and upon an appeal to the circuit court from their action disallowing a claim the county may make the defense of set-off under section 3299 of the Code, or any other defense justified by the facts. *Luck Const. Co.* v. *Russell Co.*, 335.

See INTEREST, 1; JOINT PROPERTY, 1.

COURTS. See CRIMINAL LAW, 7.

COVENANTS. See INJUNCTIONS, 4; LANDLORD AND TENANT, 7.

CRACK. See MINES AND MINERALS, 1, 2, 3, 4.

CRAPS. See CRIMINAL LAW, 4.

CRIMINAL LAW.

1. *"Byrd Liquor Law"—Strict Construction—Evidence.*—The "Byrd Liquor Law" is a highly penal statute, and is not to be extended by implication, and the evidence upon which a conviction under it may be had is an innovation on the general law and must be strictly construed. *Gayle's Case*, 958.

2. *Change of Venue—Jury From Another County—Discretion of Trial Court—Appeal and Error.*—The trial court, in the exercise of the powers to change venue and summon juries from another county, conferred by sections 4024 and 4036 of the Code, must of necessity be allowed a wide discretion, and it is the established rule that this court will not reverse the judgment of the trial court unless it plainly appears

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that such discretion has been improperly exercised. *Looney's Case*, 921.

3. *Evidence—Controversy With Other Persons.*—On a trial for homicide, evidence of the details and merits of an antecedent controversy between the prisoner and a third person, in no way connected with the case on trial, occurring at a different time and place, and with which deceased was not concerned, and at which he was not present, and constituting no part of the *res gestae* of the case on trial, is not admissible. *Looney's Case*, 921.
4. *Gaming—Code, Section 3815—A, B, C and E O Tables—Like Tables—Crap Table.*—On a warrant charging that the defendant "did unlawfully keep and exhibit a certain gaming table called a crap table, which said device is in nature of A, B, C and E O table, which said game was played with dice, against the peace and dignity of the Commonwealth of Virginia," there can be no conviction where there is no evidence that "crap" is a game of like kind with an A, B, C or E O table. Section 2518 of the Code, under which conviction is sought, does not forbid the game of "crap" *eo nomine*, and if the evidence does not show that it is a game of like kind with those named in the warrant there can be no conviction. If the warrant had followed the statute and enumerated all of the games to which it refers, it is not decided whether the same standard would be applied in determining whether "crap" is within the games prohibited by the statute. *Lewis' Case*, 962.
5. *Indictment for Selling Whiskey—Proof of Sale of "Corn Liquor."*—An indictment for illegally selling without license "whiskey," brandy, wine, beer, malt liquors, and mixtures thereof" is sufficiently sustained by proof of such sale of "corn liquor" in the absence of any adverse testimony. It is a matter of common knowledge that the term "corn whiskey" and "corn liquor" are used interchanegably, alternately and indifferently, and, upon proof of a sale of "corn liquor," the jury have the right to assume that it is of that class which is alcoholic or spiritous, distilled from corn, and comes within the terms of the statute prohibiting the sale of whiskey. *Mullins' Case*, 945.
6. *Intoxicating Liquors — Sale Without License — Evidence — Analysis by Assistant State Chemist—Inadmissibility.*—On the trial of a person indicted under the "Byrd Liquor Law" for selling cider containing more than six *per cent.* of alcohol, without license, the certificate of the Assistant State Chemist of his analysis of the cider, verified by his affidavit, is not admissible in evidence. The official chemist of the

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agricultural department (namely, the State Chemist), is charged with the performance of numerous important and delicate duties in connection with that department, many of which call for personal action involving official responsibility and professional skill, and which cannot be delegated. Of that class is the service imposed by section 24 of the law which is made the basis of a criminal prosecution, and the performance of which in the case at bar was attempted by the person styling himself "Assistant State Chemist." *Gayle's Case*, 958.

7. *Jurisdiction—Violation of Revenue Laws—Sale of Liquor in Local Option Territory—Dickenson County.*—An indictment for unlawfully selling ardent spirits in Dickenson county, without a license so to do, is an offense against the revenue laws of the State of which the circuit court of said county has concurrent jurisdiction with the justices of the peace of said county, although no license for such sale could be granted in said county. *Mullins' Case*, 945.
8. *Jurors—Selection—Statutory Provisions to Be Followed.*—The statutes in reference to the selection of jurors in felony cases were enacted, not only for the purpose of securing fit jurors, but to avoid even the suspicion of partiality or corruption in their selection. The fact that it may sometimes be inconvenient to the court or cause delay in the trial of a cause is no sufficient reason why they should not be strictly and rigidly enforced. The legislative intent in these matters should absolutely control the judiciary. The courts have no other duty to perform than to execute the legislative will without any regard to their own views as to the necessity or wisdom of the enactments. *Patrick's Case*, 933.
9. *Jury From Another County—Change of Venue—Jury Obtained—Presumption.*—Generally a motion for a jury from another county or corporation should precede the motion for a change of venue (though cases may arise where this rule would be inapplicable); and where the motion for a change of venue is based on the ground that an impartial jury cannot be obtained in the county or corporation, the fact that an impartial jury was subsequently secured in the county raises a conclusive presumption that the motion was unfounded. *Looney's Case*, 921.
10. *Making Arrest—Resistance—Justification—Burden of Proof.*—When an officer armed with a lawful warrant attempts to make an arrest in obedience to its mandate, the *prima facie* presumption, in the absence of evidence to the contrary, is that he will discharge his duty in a lawful manner; and the burden rests on the accused, who undertakes to resist

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the arrest, to show that the officer's conduct was such as to justify such resistance. *Looney's Case*, 921.

11. *Non-Support of Wife—Evidence—Other Children to Support.*—On the prosecution of a husband for the non-support of his wife, evidence that he had two small children by a former wife dependent upon him for support is inadmissible where the non-support of the wife was total. *Morgan's Case*, 941.

12. *Non-Support of Wife—Motive for Prosecution—Testimony of Wife.*—On the prosecution of a husband for the desertion and non-support of his wife, it is immaterial to enquire what motive may have actuated her to testify against him, as the prosecution is one by the Commonwealth against the accused for a violation of the criminal law of the State. *Morgan's Case*, 941.

13. *Non-Support of Wife—Wife Self-Supporting After Separation.*—The fact that the wife, after separation from her husband, caused by his misconduct, takes service and supports herself is no condonation of his offense, and no answer to an indictment against him for her non-support. *Morgan's Case*, 941.

14. *Plea—Demurrer and Replication Thereto—Effect.*—To a plea in abatement filed by a defendant in a criminal prosecution, the attorney for the Commonwealth may demur or reply, but he has no right to do both. If, after his demurrer is overruled, he replies to the plea, the demurrer will be treated as waived or withdrawn, although the prisoner objected to the filing of the replication and excepted to the ruling of the court overruling his objection. *Mullin's Case*, 945.

15. *Presence of Attorney for Commonwealth.*—While it is the policy of the statute of this State (Code, section 3988) to keep the grand jury independent of all outside interference, and free and untrammeled in their deliberations, and it is highly reprehensible for any attorney for the Commonwealth to violate in any degree either the terms or the policy of the statute, an indictment will not be quashed because the attorney for the Commonwealth appeared before the grand jury during their deliberation when not sworn as a witness, where it appears from the evidence that he did not advise them to find the indictment, did not know of their finding until the presentment was made, and was not in the room when they had under consideration or deliberation the indictment or the presentment upon which the indictment was found. *Mullins' Case*, 945.

16. *Renewal of Motion for Change of Venue or Foreign Jury.*—Although motions for a jury from another county, or for

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a change of venue, may have been properly overruled at one term of the court, they are reviewable at a subsequent time whenever the exigencies of the situation may call them into requisition. *Looney's Case*, 921.

17. *Resisting Arrest—Provoking Affray—Killing Officer—Instructions.*—The following instruction without the modification made by the court, indicated by italics, is held to be erroneous: "The court instructs the jury that although they may believe from the evidence that the deceased at the time he was shot was attempting to arrest the accused, yet if they further believe from the evidence that in making such attempt he shot at the accused, and thereupon, because of said shooting at the accused by the deceased, the accused, believing himself in imminent danger of being killed or sustaining great bodily harm, *and being without fault in provoking the affray*, returned the fire and killed the accused, such killing was not murder, notwithstanding the jury may believe from the evidence that the accused had previously threatened to kill anyone who might attempt to arrest him." *Looney's Case*, 921.

18. *Sale of Liquor Without License—Allegation of Time—Surplusage.*—An indictment for unlawfully selling liquor without a license sufficiently charges the time of the sale when it charges that it was made "on the ..... day of ....., in the year one thousand nine hundred and ..... and" within the last two years. The words quoted may be treated as surplusage, and what remains is a sufficient allegation of the time of the sale. *Mullins' Case*, 945.

19. *Venire—Code, Section 4018, Mandatory—Case at Bar.*—Section 4018 of the Code prescribes the manner of selecting and summoning a venire in a case of felony, and its provisions are mandatory. Under its provisions, not more than twenty names can be drawn and placed in the list except for good cause shown, and when more than twenty persons are ordered to be drawn and summoned the number drawn shall in no case be more than four in excess of the number to be summoned. The manifest object of the statute is to secure a drawn list of veniremen and to render it impossible to pack the jury. The violation of these provisions of the statute constitutes reversible error. In the case at bar, the first *venire facias* had been quashed, and the method adopted by the judge for obtaining the names for the second venire (making out a list of sixty names and directing the summoning forthwith of only thirty from that list) clearly indicated an intention on his part to secure the names of the thirty veniremen who had been summoned under the

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first venire. This was a departure from the mandatory provisions of the statute and constitutes reversible error, notwithstanding the good faith of judge and the probity of his motives. *Looney's Case*, 921.

20. *Venire—Drawing—Presence of Attorney for Commonwealth.*—While juries in civil case may be drawn in the presence of the attorney for the Commonwealth, there is no authority for his presence when juries are to be drawn in felony cases. He is one of the parties to the proceeding in which the jury is to sit, and it has always been the policy of our law, as far as human caution could reasonably provide, to see that the officials who select juries, as well as the jurors themselves, should stand impartial and unprejudiced. But whether or not the unauthorized presence of the attorney for the Commonwealth in the case at bar, at the drawing of the jury, was probably prejudicial to the accused, it is not decided. *Patrick's Case*, 933.

21. *Venire—Wrong Number of Names—Intentional Selection.*—If the clerk, in obedience to an improper general order of the judge, makes out the *venire facias* in a felony case for and directs the summoning of a different number of jurors from that prescribed by section 4018 of the Code, this is an intentional irregularity, and not within the curative provisions of said section. *Patrick's Case*, 933.

22. *Venire Facias—Objection—Motion After Verdict.*—An objection to the action of the trial court in not directing a *venire facias* to be issued to complete the panel when a sufficient number of jurors was not obtained from the persons summoned and in attendance on the court, as required by section 4019 of the Code, comes too late after verdict. *Patrick's Case*, 933.

23. *Venire Facias—Wrong Number of Jurors—Code, Section 4018—General Order of Judge for Different Number.*—Under the provisions of section 4018 of the Code, the clerk has no power or authority to issue a *venire facias* in a felony case directing the sheriff to summon twenty-six persons from a list of thirty names, unless the judge of the court, for good cause shown, has directed it, and a previous general order entered by the judge of the court of his own motion before the offense was committed cannot authorize the clerk to draw or have summoned a different number of jurors from that prescribed by the statute. The statute directs twenty to be drawn and sixteen to be summoned, but provides that "for good cause shown in any felony case, the judge of the court, in term time or vacation, may direct more than twenty names to be drawn and placed on the

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list." The provision cannot be departed from except as provided by the statute. *Patrick's Case*, 933.

See JURIES AND JURORS, 2.

CROSSING. See RAILROADS, 1, 2, 3, 8.

CUSTOM. See INSURANCE, 12; MASTER AND SERVANT, 14, 15; MINES AND MINERALS, 3.

DAMAGES.

1. *Damage to Land by Trespass—Uses in Near Future.*—In an action of trespass to recover damages done to the plaintiff by the defendant by erecting a bridge across a navigable stream, the plaintiff asked the court to instruct the jury that, in considering whether or not the bridge damaged the property of the plaintiff, they must consider any and all uses, not only to which the property had been put, but to which it might be put. The court added at the end of said instruction the words "in the reasonably near future," and as amended gave it, and this is held not to be to the prejudice of the plaintiff. The instruction, as amended and given, is not in conflict with an instruction given at the instance of the defendant, telling the jury that they must consider the value of the property immediately before and immediately after the construction of the bridge, by taking into consideration its uses, surroundings and capabilities, not only for the present, but for the reasonably near future. Instructions must be read as a whole. *Peek* v. *Hampton*, 855.
2. *Delivery of Inferior Goods.*—Where goods of an inferior grade have been delivered to a buyer, the measure of his damages is the difference between the value of the goods as represented at the time and place of delivery, and the value at such time and place of the goods actually delivered. *Jacot* v. *Grossman Seed Co.*, 90.
3. *Excessive—Verdicts.*—The verdict of a jury will not be set aside as excessive where the plaintiff's recovery is much less than the amount claimed in his bill of particulars, and the amount and correctness of the items claimed are dependent upon conflicting views of the evidence. *Marsteller* v. *Warden*, 353.
4. *Personal Injury—Verdicts—Excessive Damages.*—Where a personal injury case has been fairly submitted to the jury on the law, and there is ample evidence to sustain the findings of the jury, their verdict, approved by the trial court, awarding the plaintiff $17,000 damages for a broken leg and other

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injuries and suffering, will not be set aside on appeal. *Ches. & O. R. Co.* v. *Swartz*, 723.

5. *Remoteness—Breach of Contract—Collateral Agreements.*—Damages cannot be recovered for the breach of any contract unless they be such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract; that is, such as might naturally be expected to follow its violation. They must be certain both in their nature and in respect to the cause from which they proceed, and they must be proximate and certain, or capable of being made certain, and not remote, speculative or contingent. If they were only such as would have been realized from other independent and collateral undertakings, although entered into in consequence and on the faith of the original contract, they are too uncertain and remote to be taken into consideration as a part of the damages by breach of the contract in suit. *Lanston* v. *Times-Dispatch*, 797.

6. *Remoteness—Sale of Chattels—Case in Judgment.*—The contract, in the case in judgment, was for the sale by the complainant to the defendant of certain type-setting machines upon the terms named in the agreement, and not an independent agreement by which the defendant undertook and agreed to operate the machines for the benefit of the defendant, and the object of the stipulations as to installing and operating the machines was merely to insure them a fair trial and to satisfy the defendant of their suitability and efficiency for the purposes for which they were sold. For the breach of such contract the complainant is entitled to recover such damages as might be naturally expected to flow therefrom ,but not damages which may result from the substitution of rival machines in the place of those purchased of the complainant. *Lanston M. Co.* v. *Times-Dispatch*, 797.

See APPEEL AND EBBOR, 14, 24; CARRIERS, 1; CONSTITUTIONAL LAW, 3; FRAUD AND FRAUDULENT CONVEYANCES, 5; INJUNCTIONS, 1, 2, 4; INVITEES, 1; MASTER AND SERVANT, 18; NAVIGABLE WATERS, 2; PRINCIPAL AND SURETY, 1; SALES, 2.

DECEIT. See FRAUD AND FRAUDULENT CONVEYANCES, 3, 8.

DECLARATION. See PLEADING, 4, 5, 6; PROCESS, 1; RULE DAYS, 1, 2.

DEEDS.

1. *Acknowledgment—Judicial Act—Impeachment.*—Taking and certifying the acknowledgment of a deed is regarded as a

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judicial act in this State, and hence the certifying officer's determination of the matters involved has the conclusive force and effect of a judgment and imports absolute verity, and cannot be collaterally attacked. It cannot be impeached even directly, save in a court of equity, and not then except for fraud. *McCauley* v. *Grim*, 610.

2. *Construction—Case in Judgment—Fee-Simple—Trusts and Trustees.*—Under a deed conveying land to a trustee for the sole and separate use of W. (a married woman) "during her lifetime and at her death in trust for her children," followed by a provision that "if at any time the said W. shall convey the whole or any part of the said land by deed duly executed according to the laws of Virginia, then the trustee shall thereafter hold the same in trust for such person or persons as may be appointed and directed by such deed or deeds," W. takes a fee-simple estate. The deed is practically a conveyance in trust to W. for life with remainder to her children, unless she should convey the land, and then in trust for such person or persons as she may appoint or direct by such deed or deeds. *Culpeper Nat. Bank* v. *Wrenn*, 55.

3. *Construction—Granting and Habendum Clauses—Conflict.*—Under the technical common law rule, the habendum clause of a deed yields to the granting clause where there is a repugnance between the estate granted and that limited in the habendum, but this rule has no application where the intention can be ascertained with reasonable certainty from the whole instrument, and no legal obstacle lies in the way of giving effect to such intention. *Culpeper Nat. Bank* v. *Wrenn*, 55.

4. *Construction—Intention—Deed to Be Read as a Whole.*—In construing a deed or other written instrument the object is to ascertain the meaning of the parties as expressed in the instrument, and, in ascertaining the purpose and object of the parties, all parts of the instrument must be taken and considered together, and, no matter what the form of the instrument may be, effect must be given to the intent whenever it is clear and free from doubt. *Culpeper Nat. Bank* v. *Wrenn*, 55.

5. *Delivery—Intention—Evidence.*—The delivery of a deed is essential to its validity. The fact of delivery is one of intention which must be manifested by some express act of the grantor, or by acts, words or conduct manifesting an intention to deliver, and, by such act of delivery, the grantor must intend to lose control or dominion over the deed, and that it shall pass title at the same time to the grantee. *Leftwich* v. *Early*, 323.

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6. *Delivery—Necessity Of.*—Formal delivery of a deed is not essential to its validity if there be acts evidencing an intention to deliver, but an essential requisite to a good deed is that it be delivered by the grantor himself or his attorney, and the deed takes effect only from such delivery. *Leftwich* v. *Early*, 323.

7. *Delivery—Parol Evidence.*—The rule that parol evidence is inadmissible to show that a deed perfect on its face was delivered to the grantee therein on condition has no application where the question is whether there was such a complete and perfect delivery by the grantor to the grantee as to vest a perfect and indefeasible title in the matter. This is a question of fact to be determined by the circumstances of the case, and cannot, in the majority of instances, be declared as a matter of law. *Leftwich* v. *Early*, 323.

8. *Delivery to Stranger—Declaration of Use.*—While a deed may be delivered not only to the grantee himself, but to a stranger for his use, or declared to be delivered, although the grantee be absent, yet, if delivered to stranger, without any declaration or other matter to show that it is for the use of the grantee, it is not a sufficient delivery. *Leftwich* v. *Early*, 323.

9. *Possession—Presumption of Grant—Evidence.*—Where the origin of the possession is not accounted for, and would be unlawful unless there had been a grant, length of possession is *prima facie* evidence, but only *prima facie*, from which a jury might or might not have presumed a conveyance. *McCauley* v. *Grim*, 610.

10. *Rescission—Deed in Consideration of Support.*—Where the consideration of a deed is the maintenance and support of the grantor by the grantee, during the latter's life, and he fails or refuses to furnish support, the grantor may come into a court of equity and have the conveyance rescinded, as he has no adequate remedy at law. *Martin* v. *Hall*, 358.

11. *Severance of Surface and Minerals—Deed by One Joint Tenant.*—While the general owner of land may grant any or all of the underlying minerals and remain the owner of the surface, or may grant the surface, reserving any or all of the underlying mines, and thus sever the title of the surface and the underlying mineral or minerals, yet such a conveyance, by less than all the joint tenants where land is so held, does not effect a severance of the mineral interest from the surface, but makes the grantee, if he be a stranger, a tenant in common with the joint tenant, who did not unite in the conveyance. *Va. Coal & Iron Co.* v. *Hylton*, 418.

See CORPORATIONS, 2; EVIDENCE, 6, 14; HUSBAND AND WIFE, 1; INFANTS, 1; JOINT TENANTS, 1; MORTGAGES, 1; TENANTS IN COMMON, 1; WILLS, 12.

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DEMURRAGE. See CARRIERS, 2, 3.

DEMURRER. See EQUITY, 2.

DEMURRER TO EVIDENCE.

1. *Concessions—Waiver.*—Upon a demurrer to the evidence, the demurrant admits the truth of the demurree's evidence and all just inferences that a jury might properly draw therefrom, and waives all of his own evidence in conflict with that of the demurree, and all inferences from his own evidence, although not in conflict with the demurree's evidence, which do not necessarily result therefrom. *White* v. *American Nat. Life Ins. Co.*, 305.
2. *Conflicting Evidence—Judgment.*—Upon a demurrer to the evidence, where the evidence is conflicting and is of such character that the jury might have found a verdict for the demurree, it is the duty of the court to enter judgment in his favor. *Jordan* v. *Walker*, 109.
3. *Conflicting Evidence—Railroads.*—Where the evidence is conflicting as to whether or not a railroad company was negligent in the operation of a train which inflicted the injury complained of, and there is a demurrer thereto by the company, the negligence of the company must be considered as established. *Boyd* v. *Southern R. Co.*, 11.
4. *Grounds—General Statement—Case at Bar.*—Where the ownership by the defendant of the instrumentalities which inflicted the injury complained of was proved by him on the former trial of the case, and in the instant case was admitted by his counsel in his opening statement to the jury, and in the examination and cross-examination of witnesses both parties have proceeded upon the theory that the defendant was such owner, if the defendant intends in his demurrer to the evidence to rely upon the fact that such ownership has not been proved, it is incumbent upon him to plainly state that ground of demurrer in his written statement of grounds of demurrer, or at least to specify it with reasonable certainty, else it cannot be considered. A general specification broad enough to cover that and several other grounds of demurrer is not a compliance with either the letter or the spirit of the statute. *McMenamin* v. *Southern R. Co.*, 822.
5. *Grounds—Insufficient Statement—Waiver—Joinder—Duty of Court.*—The failure of a demurree to evidence to object to the grounds of demurrer because not as specific as he desires is not a waiver of the requirement of the statute that the demurrant shall state the grounds of his demurrer with

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reasonable certainty, and that no other grounds than those so stated shall be considered, nor does it give the court the right to consider such grounds. *McMenamin* v. *Southern R. Co.*, 822.

6. *Negligence—Contributory Negligence.*—On a demurrer to the evidence by the defendant, if, as in the case at bar, the jury might have found that the proximate cause of the plaintiff's injury was the negligence of the defendant, and that the plaintiff was without fault on his part, the court must so find. *Stonega C. & C. Co.* v. *Williams*, 657.

7. *Statement of Grounds—Object—Particularity Required.*—The object of the statute (Acts 1912, p. 75) in requiring the grounds of a demurrer to the evidence to be stated in writing was at least two-fold: First, to require the demurrant to give notice in writing of the grounds or causes of demurrer which he intended to rely on, and, second, to prevent him from assigning grounds of demurrer in the appellate court wholly different from those relied on in the trial court. The degree of particularity required must depend to some extent upon the character of the case. Where the language used is broad enough to embrace and comprehend any one of several causes of demurrer, but fails to specify any one of them as the particular ground or cause relied on with reasonable certainty, considering the facts and circumstances of the case, it is not a sufficient compliance with the statute. *McMenamin* v. *Southern R. Co.*, 822.

See MASTER AND SERVANT, 20.

DEPARTURE. See PLEADING, 2, 3.

DESERTION. See CRIMINAL LAW, 12; DIVORCE, 3.

DISMISSAL AND NON-SUIT.

1. *Without Prejudice.*—The dismissal of a bill for want of necessary parties should be without prejudice. *Buchanan Co.* v. *Smith*, 704.

See PROCESS, 1; RULE DAYS, 1, 2.

DIVORCE.

1. *Decree for Alimony—Effect on Property—Judgment of Another State.*—A decree for alimony rendered by a court of this State, having full jurisdiction over the parties and the subject matter of the suit, in so far as it affects the rights of property established by said decree, cannot in any wise be affected by a decree rendered by a court of another State in a suit between the same parties. *Isaacs* v. *Isaacs*, 562.

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2. *Desertion—Case in Judgment.*—The husband, in the case in judgment, is not entitled to a divorce from his wife on the ground of desertion. He seems never to have made any provision for a home for her nor to have taken care of her, and when she left him they parted as friends, and she went with his consent. Since their separation he has made no effort to get her to return, and has not answered her letters. It is his duty now to provide a home, however humble, for their habitation, and to invite her to return to her duty and share it with him. The well-being and good order of society demand that husbands and wives shall in good faith endeavor to reconcile their differences, and dwell together in unity and peace rather than to make occasion for resort to the courts for redress. *Devers* v. *Devers*, 517.
3. *Desertion—Case in Judgment—Jurisdiction Declined.*—The trial court properly refused to entertain a suit for divorce (on the ground of desertion) brought by the husband, where it appeared that the native domicile, as well as the matrimonial domicile, of the parties was the District of Columbia, to which the plaintiff goes daily as a sleeping car conductor; that he proceeded against his wife by order of publication, and gave her no other notice of depositions taken in the city of Washington or elsewhere; that the affidavit for the order of publication was fatally defective, and no order of publication has been produced and filed in the cause, or noticed by the clerk, and there has been no appearance by the wife, by counsel or otherwise; that the defendant is a non-resident of the State; that the parties never cohabited in this State, and the evidence does not establish a *bona fide* residence of the plaintiff in the county in which the suit was brought. *Yates* v .*Yates*, 678.

See APPEAL AND ERROR, 7.

DOWER.

1. *Suit to Recover—Aliened and Unaliened Lands—Parties.*—In a suit by a widow to have dower assigned to her in the lands whereof her husband was seized in fee during the coverture, some of which lands were aliened by the husband during the coverture without her concurrence, where it is sought to have the whole dower assigned out of the unaliened lands in the hands of the heirs, to the exoneration of that aliened by the husband in his lifetime, the heirs are necessary parties to the suit, and it is error to make any decree in the cause on the merits until the heirs are made parties thereto. *Bragg* v. *Tinkling Land Co.*, 1.

See SPECIFIC PERFORMANCE, 1.

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DURESS. See TAXATION, 12.

EASEMENT. See NAVIGABLE WATERS, 2.

EJECTMENT.

1. *Excessive Verdict—Putting Party on Terms.*—The practice of putting a party on terms, where the verdict is plainly erroneous in part, is a wise and salutary one, saving delay, costs and, above all, ending litigation, and is as applicable to an action of ejectment as to any other action. *Honaker* v. *Shrader*, 318.
2. *Identification of Land Sued For—Case at Bar.*—Giving the evidence for the plaintiff in the case at bar, written and oral, all the weight it is entitled to, it cannot be said that it satisfactorily shows that the land which the plaintiff sues to recover is the same that was in the possession of the defendant. *Spriggs* v. *Jamerson*, 250.
3. *Outstanding Legal Title—Nature of.*—An outstanding title in another to defeat an action of ejectment must be a present, subsisting and operative legal title upon which the owner could recover if asserting it by action. *Holladay* v. *Moore*, 66.
4. *Outstanding Legal Title—Plaintiff's Title.*—An outstanding legal title in another, whether that other be a stranger, the Commonwealth or the defendant, will defeat a recovery by the plaintiff in an action of ejectment. A plaintiff in ejectment must recover upon the strength of his own title, and to this rule there are few exceptions. *Holladay* v. *Moore*, 66.
5. *Plaintiff's Title—Identity of Land—Defendant's Title.*—Until the plaintiff in ejectment has made out a *prima facie* case for recovery by showing his right to the possession of the land sued for any identifying the same, the defendant is not required to show in what manner or by what title he held or obtained possession, and his failure to do so cannot strengthen the plaintiff's case. *Spriggs* v. *Jamerson*, 250.
6. *Plaintiff's Title—Peaceable Possession.*—Prior peaceful possession by the plaintiff in ejectment or those under whom he holds, claiming to be the owner in fee, if proved, is *prima facie* evidence of ownership and seizing, and is sufficient to authorize recovery unless the defendant shall show a better title in himself or another, such as is described in paragraph 3 above. *Holladay* v. *Moore*, 66.
7. *Plaintiff's Title—What to be Proved—Exceptions to Rule.*—Generally, the plaintiff in ejectment must recover solely upon the strength of his own title, and not on the weakness

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of that of the defendant, and the plaintiff's title must be a legal title. The title to be proved by the plaintiff in order to entitle him to recover, as a general rule, must be either a grant from the Commonwealth, with which he connects himself by a regular chain of title, or he must prove such a state of facts as will warrant the jury in presuming a grant, or as will show adversary possession for the statutory period under a claim or color of title. While there are exceptions to the rule as well settled as the rule itself, amongst them, that the defendant without title or authority intruded upon the plaintiff or his ancestor, who was in peaceable possession of the land when the defendant entered and took possession, the plaintiff in the case at bar has not brought himself within them. *Spriggs* v. *Jamerson*, 250.

See IMPROVEMENTS, 1.

EMINENT DOMAIN. See DAMAGES, 1.

ENGINEER'S ESTIMATES. See CONTRACTS, 5, 6, 7, 8.

EQUITY.

1. *Amended Bill—When Not Allowed.*—Where an amended bill sets up facts practically identical with those contained in the original bill, and sets forth no new matter that was not known at the time of the argument of the demurrer to the original bill, the trial court may properly refuse to allow it to be filed. *Starke* v. *Storm*, 651.
2. *Bills—Multifariousness—Dismissal Without Objection.*—It is the duty of the court, of its own motion, to dismiss a bill that is multifarious, although not objected to on that ground by the parties defendant; hence it is immaterial that only one of two defendants demurs on that account. *Dennis* v. *Justus*, 512.
3. *Bills—Multifariousness—What Constitutes.*—A bill is multifarious when there is improperly joined in one bill distinct and independent matters, thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill. In the latter case the proceeding would be oppressive, because it would tend to load each defendant with an unnecessary burden of costs by swelling the pleadings with the statement of the several claims of the other defendants with which he has no connection. *Dennis* v. *Justus*, 512.
4. *Complete Relief—When Refused—More Adequate Remedy at Law.*—Where the specific purpose for which a suit in equity

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was brought has failed, in whole or in part, a court of equity will not in all cases go on to decree against any party to it. If the remedy at law is more appropriate than in equity, or the verdict of a jury is proper for the determination of the controversy, the jurisdiction in equity will be declined. *Branham* v. *Antrip*, 314.

5. *Contracts Partly Written.*—While courts of equity alone have jurisdiction of suits for the reformation of contracts, the jurisdiction of courts of law for the enforcement of contracts partly in writing and partly parol is unquestioned. *Marsteller* v. *Warden*, 353.

6. *Laches.*—Courts of equity refuse relief to parties who, with conscious knowledge of the situation, have chosen to sleep on their rights until all of the principal actors in the transaction have passed away, and when, from the loss of evidence any conclusion that the court might reach would necessarily be conjectural and founded upon random guess rather than upon any just ground of belief based upon sufficient proof, a just determination of the controversy between the parties would be impossible. In such cases the courts leave the complaining parties where their inexcusable negligence has placed them. *Hill* v. *Saunders*, 60.

7. *Law—Equity—Personal Services.*—For personal services rendered by an adult the remedy at law is plain, adequate and complete, and there is no jurisdiction in equity. *Starke* v. *Storm*, 651.

8. *Quieting Title—Who May Sue—Code, Section 3058 as Amended.*—Since the amendment of section 3058 of the Code of 1912 (allowing any person who has an equitable title to land and the right to the legal title to file a bill to remove a cloud upon the title to real estate, whether he be in possession or not), a person who has neither the complete legal and equitable title to land nor the actual possession thereof, may implead the unknown heirs and claimants under former owners, who are also out of possession and who have long ago abandoned the land, to quiet its title and remove a cloud therefrom. *Buchanan Co.* v. *Smith*, 704.

9. *Report of Commissioner in Chancery—Weight Given to.*—Reports of commissioners in chancery are *prima facie* correct and objection must be made to them. When this is done, it is the duty of the court to examine the evidence returned by the commissioner, and upon which his conclusions are based, and review his conclusions. If the evidence consists of depositions which have been taken by the commissioner, or in his presence, and is conflicting, and his conclusions are clearly supported by competent and unimpeached wit-

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nesses, his report will not be disturbed, unless it is clear that the weight of the testimony is contrary to his conclusions. But, even in such case, the court will review and weigh the evidence, and, if not satisfied with the findings of the commissioner, will overrule them. The report will only be accepted as conclusive when the testimony, though conflicting, is evenly balanced, and the report is supported by the testimony of competent and unimpeached witnesses. *Diebold* v. *Tatterson*, 766.

See ALTERATION OF INSTRUMENTS, 3; DEEDS, 10; DISMISSAL AND NON-SUIT, 1; PARTIES, 1, 2; SPECIFIC PERFORMANCE, 1; VENDOR AND PURCHASER, 1, 4; WILLS, 6, 7.

ERASURES. See WILLS, 8.

ESTATES. See HUSBAND AND WIFE, 1.

ESTOPPEL.

1. *Conduct of Other Party—Ignorance of Facts—Fraud.*—The doctrine of estoppel *in pais* is a purely equitable one, and it is essential to its application, where a party claims to have been influenced to his prejudice by the conduct of another, that he should have been ignorant of the state of facts relied on to constitute such estoppel. Nor can one base a claim for an estoppel upon acts or conduct induced by his own fraud or false represenations. *Luck Construction Co.* v. *Russell Co.*, 335.

See APPEAL AND ERROR, 14, 15, 18; BILLS AND NOTES, 1; CARRIERS, 5; FRAUD AND FRAUDULENT CONVEYANCES, 1; MASTER AND SERVANT, 13; MUNICIPAL CORPORATIONS, 4.

EVIDENCE.

1. *Admissibility—Endorsement—Denial—Other Similar Endorsements.*—In an action against a son as endorser of notes made by and discounted for his father, where the facts and circumstances tend to show that the son had full knowledge of the use his father was making of his name, fifty-odd other notes, similarly made, endorsed and negotiated, are admissible in evidence as tending to show that the father had authority to endorse the son's name on the note sued on. *Bowman* v. *First Nat. Bank*, 463.
2. *Admissibility—Introducing Same Evidence—Waiver.*—An objection to the introduction of evidence is deemed to have been waived where the same fact is testified to by the objector himself. *Davis* v. *Cole*, 501.
3. *Admissions—Admissibility—Lack of Interest When Made.*—The general rule is that the declarations of a party to the

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suit, or a person who has an interest therein, are admissible in evidence against such party or such person. One of the qualifications of the rule, however, is that the declarations or admissions which are thus receivable in evidence must be those of a party or person having at the time they are made some interest in the matter afterwards in controversy in the suit to which he is a party or in which he has an interest. *Metro. Life Ins. Co.* v. *O'Grady*, 830.

4. *Boundaries—Oral Testimony.*—Oral evidence is always admissible as to location and boundary, and hence testimony as to the contents of a lost title bond may be received for the purpose of throwing light upon the true location of a disputed boundary line. *Honaker* v. *Shrader*, 318.

5. *Collateral Facts.*—Nor is it error to prove the same facts about the giving of the collateral note and its repudiation by a surety on the notes who was to be relieved of liability if the collateral note was accepted, or by a payee of the notes in suit. *Davis* v. *Cole*, 501.

6. *Consideration—Evidence to Contradict—Case in Judgment.*—The statement in a deed of a money consideration and of its payment is a mere recital, and, while such recital is *prima facie* evidence of the facts recited, the true consideration for the conveyance may be inquired into, and it may be shown by parol evidence that the actual consideration paid or promised was different from that stated in the deed. and also to contradict the recital in the deed that the consideration had been paid, provided such evidence does not alter or contradict the legal import of the deed. In the case in judgment, while the deed recited a money consideration paid, the parties were permitted to show that the real consideration was the future support and maintenance of the grantor. *Martin* v. *Hall*, 358.

7. *Contributory Negligence—Pleading.*—In an action on the case the defendant may, under the plea of not guilty, accompanied by the ground of defense that the plaintiff was guilty of contributory negligence, introduce any evidence which shows that the plaintiff was guilty of contributory negligence *per se*, or, being relevant, tends, along with other facts and circumstances, to show his contributory negligence. *Southern R. Co.* v. *Rice*, 235.

8. *Experts—Data for Opinion.*—An expert cannot be asked whether he would regard it as safe to rely on pins to hold in position a mass of stone from fifty to sixty feet long and from twenty to thirty feet wide. The weight and dimensions of the stone which in fact fell could not have been known until after it fell, and could not have been made

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the subject of a hypothetical question to a witness however expert he may have been. *Bowles* v. *Va. Soapstone Co.*, 690.

9. *Experts—Reasons for Opinions.*—Expert testimony is a useful and necessary adjunct to the administration of justice, and a capable expert can often throw light upon dark places; but the force of expert testimony must, after all, in large measure, depend upon the reasons that the witness is able to give for the opinions which he expresses. *Bowles* v. *Va. Soapstone Co.*, 690.

10. *General Reputation—Particular Facts.*—The fact that the plaintiff has introduced evidence of a witness' general reputation for truth does not authorize inquiry as to particular facts which may tend to affect his credibility. *Bowman* v. *First Natl. Bank*, 463.

11. *Husband and Wife—Privileged Communications—Wills.*—Under the provisions of section 3346-a of the Code, neither husband nor wife can, without the consent of the other, be examined in any case as to *any communication* made by the one to the other while married, nor can such communication be revealed, without such consent, after the marriage relation ceases. The statute is founded on public policy and applies to "any communication" between them, of any nature, whether confidential or not, and it is immaterial by whom or for what purpose the husband or wife may be called as a witness, nor whether for or against each other. Conversations, therefore, between a husband and his wife as to the making of his will cannot be given in evidence by his widow, no matter by whom she is called as a witness. *Wilkes* v. *Wilkes*, 886.

12. *Improper Reception—Harmless Error.*—The reception of improper evidence as to the location of a boundary line is harmless error where the land in dispute is clearly identified and located by other evidence in the case. *Honaker* v. *Shrader*, 318.

13. *Letters—Replies as Evidence of Receipt.*—A reply to a letter of a given date is sufficient evidence of its receipt without evidence that it was properly addressed and postage paid thereon. *Davis* v. *Cole*, 501.

14. *Lost Deed—Proof Required.*—In suits to set up a muniment of title by parol evidence courts of equity require strong and convincing proof of the former existence of the evidence of such title, its loss and its contents. *Leftwich* v. *Early*, 323.

15. *Order of Introduction—Discretion of Trial Court.*—Much latitude of discretion should be allowed the trial court in the matter of the examination of witnesses, and its ruling will

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not be reversed merely because evidence proper in chief was introduced in rebuttal. *Jacobs* v. *Warthen*, 571.

16. *Pedigree—Whose Declarations Receivable—Death of Declarant.*—Pedigree declarations constitute an exception to the hearsay rule, and only those connected with the family by blood or marriage are competent declarants, and the declarations of even these are inadmissible during the lifetime of the declarant. If living, the declarant is subject to examination as any other witness. *Lemons* v. *Harris*, 809.

17. *Positive and Negative Statements—Weight.*—The positive testimony of a single credible witness that he saw or heard a particular thing at a particular time ought ordinarily to outweigh that of a number of witnesses, equally credible, who, with the same opportunities, testify that they did not see or hear it, but where a witness, who denies a fact in question, has as good opportunity to see and hear it as he who affirms it, and his attention, because of special circumstances, was equally drawn to the matter controverted, the general rule that the witness who affirms a fact is to be believed rather than he who denies it does not hold good. The denial of the one in such case constitutes positive evidence as well as the affirmance of the other, and produces a conflict of testimony to be decided by the jury. *Ches. & O. R. Co.* v. *Chapman*, 32.

18. *Precautions After Accident—Inspection of Mines.*—It is not permissible for the purpose of showing a negligent injury to show that a mine was inspected more frequently after the accident complained of than before. Evidence of subsequent repairs or precautions taken after the happening of the accident causing the injury is not admissible to prove antecedent negligence. *Bowles* v. *Va. Soapstone Co.*, 690.

19. *Principal and Surety—Admissions—Case at Bar.*—In an action against principal and surety on notes given for a sawmill, where the surety claims that, after his principal had failed to pay, he bought the mill of creditor, who failed to deliver it, and the creditor denies such sale and claims that the surety was always interested in the purchase because he had sold timber to the principal, who was to manufacture it by the use of the mill, and that he signed the notes as surety only, it was not error to prove by the admissions of both parties that the surety had sold to his principal standing timber on the former's land before the principal had bought the sawmill. *Davis* v. *Cole*, 501.

20. *Published Rules of Railroad—Partial Abrogation—Parol Evidence.*—It is entirely competent to show by parol that a printed rule of a railroad company had been modified or

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partially abrogated in its application to a particular yard of the company by those charged with its application and enforcement on that yard, and that its application in the modified form was the universal practice on that yard. This does not vary or contradict the terms of the rule nor submit its interpretation to the jury. *Ches. & O. R. Co.* v. *Swartz*, 723.

21. *Railroads—Personal Injury—Report to Company—Production.*—In an action against a railroad company to recover for a personal injury, the court may require the production by the defendant of a contemporaneous written statement of an employee concerning the injury complained of who was examined as a witness by the defendant. The statement is admissible for the purpose of impeachment if it contradicts the witness, and if it does not contradict, but corroborates him, then it is not prejudicial to the defendant. *Ches. & O. R. Co.* v. *Swartz*, 723.

22. *Relevancy—Death by Wrongful Neglect.*—In an action for death by negligence, a conversation between witnesses and deceased to the effect that he was well pleased with his position and regarded it as the best job he ever had is wholly immaterial to the issue. *Bowles* v. *Va. Soapstone Co.*, 690.

23. *Speed Ordinances—Violation—General Reputation.*—Where an engineman was killed while violating a speed ordinance, it is generally not permissible for his employer to introduce evidence tending to show that the decedent had the reputation among his fellow-employees as a fast runner, and had previous to the accident in which he was killed and at the same point disregarded the speed ordinance. *Southern R. Co.* v. *Rice*, 235.

24. *Speed Ordinances—Violation—General Reputation.*—In an action to recover for the death of an engineman killed while violating a speed ordinance where the uncontradicted evidence shows that at the time he was killed he was running his engine in the city limits at a speed of from twelve to fifteen miles an hour, whereas the maximum limit fixed by the city ordinance was only four miles an hour, evidence is not admissible which tends to show that he had the reputation of being a fast runner and had previously violated the ordinance. *Southern R. Co.* v. *Rice*, 235.

25. *Survivor of Transaction—Will as a Matter of Transaction.*—A will is the sole act of the testator, and its execution is not such a contract, matter or transaction as comes within the purview of section 3346 of the Code, excluding the survivor of a contract or other transaction from testifying. A

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widow, therefore, is not excluded by said section from testifying as to the execution of the will of her late husband. *Wilkes* v. *Wilkes*, 886.

26. *Town Ordinance—Authentication.*—Although the records of a town council were kept in a crude and careless manner, in an account book which had been used for other purposes and contained matter other than the by-laws and ordinances, the book may be received in evidence and will be sufficient proof of the adoption of an ordinance contained therein, if the record, when considered as a whole, contains a sufficient authentication of the passage of the ordinance in question. *Looney's Case*, 921.

27. *Verbal Admissions—Received with Caution—Lapse of Time—Failure to Identify—Rejection—Not Reversible Error.*—Evidence of *verbal admissions* ought to be received with great caution because of the liability of witnesses to mistake or misunderstand the admissions when made, and to remember inaccurately or to misrepresent it afterwards. This rule applies with peculiar force where such evidence is to affect the rights of third persons. Where the declarations were made in a casual conversation five or six years before the witness testified, and do not appear to have been distinctly remembered or precisely identified, the ruling of the trial court in either admitting or rejecting them ought not to constitute reversible error. *Metro. Life Ins. Co.* v. *O'Grady*, 830.

28. *Writing—Original—Copy.*—A paper offered in evidence as a copy appearing in fact to be the original, the objection to the introduction of the copy until the original was accounted for was properly overruled. *Davis* v. *Call*, 501.

29. *Written Contract—Incomplete—Parol Evidence.*—The rule excluding parol evidence to vary a written contract has no application when it is apparent from the writing itself that it does not embody the entire agreement. In such case, the writing being incomplete, it must be supplemented by other evidence, not to contradict or vary its terms, but to establish the real contract between the parties. *Marsteller* v. *Warden*, 353.

30. *Written Contract—Incomplete—Parol Evidence as to Omitted Terms.*—In a written contract for the construction of the walls of a church, and also the walls of a tower, a stipulation "that the walls of the tower shall correspond with the walls of the church" applies to and controls the quality, finish and appearance of the material to be used, so as to maintain uniformity of aspect between different portions of the same structure, and does not control the thickness of

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the tower wall. The contract, so far as it relates to the thickness of the tower wall, is incomplete on its face, and parol evidence is admissible to show what the real contract between the parties was on that subject. *Marsteller* v. *Warden*, 353.

31. *Written Instruments—Parol Evidence to Vary—Bills and Notes.*—The endorser of a negotiable note will not be permitted to show by parol that he was not to be bound by his endorsement. Parol contemporaneous evidence is not admissible to vary, alter or contradict the terms of a valid written instrument. *Lynch* v. *O'Brien*, 350.

See ALTERATION OF INSTRUMENTS, 3; APPEAL AND ERROR, 13; CONTRACTS, 11; CRIMINAL LAW, 1, 3, 6, 11, 12; DEEDS, 5, 7, 9; FALSE REPRESENTATIONS, 1; FRAUD AND FRAUDULENT CONVEYANCES, 8; INSURANCE, 2, 3, 15, 16; MARRIAGE, 1; MASTER AND SERVANT, 8; MINES AND MINERALS, 4; MORTGAGES, 1; NEGLIGENCE, 1; PRINCIPAL AND AGENT, 1, 3; PROCESS, 2, 3; SALES, 5, 6; TRUSTS AND TRUSTEES, 3; WARRANTIES, 1; WILLS, 8, 18; WITNESSES.

EXECUTORS AND ADMINISTRATORS. See INSURANCE, 1.

EXEMPTIONS. See TAXATION, 8, 9, 10.

EXPERTS. See EVIDENCE, 8, 9.

FALSE REPRESENTATIONS.

1. *Burden of Proof.*—A defendant who relies upon false representations of the plaintiff as a defense to an action to recover the purchase price of property has the burden of showing, by a preponderance of affirmative evidence, that the representations were made by the plaintiff, were false, and that the defendant relied upon them and was injured by reason of their falsity. *Jacobs* v. *Warthen*, 571.

See FRAUD AND FRAUDULENT CONVEYANCES, 4, 5, 6; INSURANCE, 3; RECISSION, 1, 2, 3, 5.

FEE-SIMPLE. See HUSBAND AND WIFE, 1; LIMITATION OF ACTIONS, 4.

FINAL JUDGMENT. See APPEAL AND ERROR, 11, 30.

FORFEITURES. See INSURANCE, 8, 9, 13.

FRAUD AND FRAUDULENT CONVEYANCES.

1. *Acquiescence—Laches—Estoppel—Mere Delay.*—Mere delay will not estop a purchaser of stock from interposing the

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defense that the contract was procured by the fraud of the seller's agent, where the rights of third persons have not intervened, and the position of the seller has not been injuriously affected by the delay. Acquiescence or affirmance does not bind the purchaser if induced by a resonable expectation on his part that the fraud will be remedied. *White* v. *Am. Nat. Life Ins. Co.*, 305.

2. *Affirmance—Attending Meeting of Stockholders.*—Giving a proxy to represent a stockholder at a meeting of stockholders does not operate as a waiver of the stockholder's right to rescind the contract for fraud in its procurement where the meeting was only a few days after the subscription was made, and long before the fraud was discovered. *White* v. *Am. Nat. Life Ins. Co.*, 305.

3. *Case for Jury.*—An action for deceit is peculiarly one for the consideration of a jury when the conclusions to be drawn from the evidence are not so certain and incontrovertible that fair minded men may not differ with respect thereto. *Jordan* v. *Walker*, 109.

4. *Misrepresentation—Materiality.*—The representation by an agent for the sale of stock in a corporation that his principal will at any time, upon request, repurchase the stock of any stockholder who may choose to dispose of the same is a material representation and sufficient, if untrue, to avoid the contract. *White* v. *Am. Nat. Life Ins. Co.*, 305.

5. *Reliance Upon—Inquiry.*—One to whom a representation has been made as an inducement to enter into a contract has the right to rely upon it as true *quoad* the maker, and he need make no further inquiry; and if he does so rely upon it, and it turns out to be untrue, the party making the representation is liable for the resulting damages, which may be recovered in an action of deceit. *Jordan* v. *Walker*, 109.

6. *Reliance Upon—Question for Jury.*—Whether the plaintiff in action of deceit (to recover damages for the false representations of the defendant) relied upon the defendant's representations, or acted in whole or in part on his own knowledge, is a question for the jury. *Jordan* v. *Walker*, 109.

7. *Sale of Land—Statute of Frauds—Letter Accepting Offer.*—A letter written by the owner of land, in reply to a written proposal to purchase, saying, "I accept the offer you made me for $1,500 cash," and signed by such owner, is a sufficient compliance with the statute of frauds. *Croghan* v. *Worthington Hard. Co.*, 497.

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8. *Waiver—Knowledge of Rights—Burden of Proof.*—A plaintiff who admits fraud in the procurement of the contract in suit and relies upon a waiver of the fraud by the defendant has the burden of proof to show by clear evidence that the defendant, after the fraud became known to him, waived the same and ratified the contract. The waiver must be distinctly made, with full knowledge of the rights intended to be waived. The fact that a party knows his rights and intends to waive them must plainly appear. *White* v. *Am. Nat. Life Ins. Co.*, 305.

See CONTRACTS, 8; ESTOPPEL, 1; FALSE REPRESENTATIONS, 1; INSURANCE, 5; RECISSION, 1, 2, 3, 5; SALES, 3; TORTS, 1.

FRAUDS (STATUTE OF).

1. *Promise to Become Surety—Indemnity—Statute of Frauds—Case at Bar.*—A promise by a surety that he will indemnify another if he will become co-surety with him on the debt of a third person is an original undertaking and not within the statute of frauds. In the case at bar, the promise, which was held to be an original undertaking, was in the following words: "Go ahead and endorse it; you need not be uneasy; Gillespie" (the principal) "is all right. If he did not have a thing, you will never have a dollar to pay as long as I have got a dollar's worth of property." *Wolverton* v. *Davis*, 85 Va. 64, *disapproved*. *Alphin* v. *Lowman*, 441.

2. *Promise to Answer for Debt of Another—Statute of Frauds—Negotiable Instruments Law.*—The principle announced above is not affected by section 68 of the negotiable instruments law with reference to the liability of joint payees or endorsers who endorse negotiable paper. The object and purpose of that section is only to give statutory force to a principle already established. That section establishes the *prima facie* order in which endorsers are to be held liable, but among themselves they are permitted to show that they have agreed otherwise. The clause with respect to joint payees or endorsers was added, not to deprive them of the right to prove by evidence *aliunde* that they have made an agreement among themselves which varied the liability imposed by law, but out of abundant caution to negative the conclusion that they were to be liable in the order in which they became endorsers, for when there are two or more joint endorsers, it is apparent that the mere affixing of their signatures must have been successive one after the other. *Alphin* v. *Lowman*, 441.

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FREIGHT. See CARRIERS, 2, 3.

GAMING. See CRIMINAL LAW, 4.

GRAND JURY. See CRIMINAL LAW, 15.

GUARANTY.

1. *Contracts.*—A promise by an assignee "to pay the just freights and demurrage charges on coal covered by this assignment" is a direct promise to pay such freights and demurrage charges and is not merely a guaranty of such payments. *Citizens Bank* v. *Norfolk & W. R. Co.*, 45.

See PLEADING, 1.

GUARDIAN AND WARD.

1. *Guardian De Facto.*—A guardian de facto or *de son tort* is purely a creature of a court of equity, and is one who takes possession of an infant's property without right or lawful authority, and will be required to account therefor. *Starke* v. *Storm*, 651.

HIGHWAYS.

1. *Roads—Location—Case at Bar.*—The evidence in the case at bar satisfactorily establishes that the true location of the road in controversy is that claimed by the plaintiff in his bill. The road conforms to the description given in the deed under which the plaintiff claims, is upon the location understood between the plaintiff and his grantors, and this construction of the rights of the parties has been continously acted upon by the parties, without objection, from the time the plaintiff obtained his deed in 1887 until the defendant undertook to obstruct the plaintiff in his use of the road. *Mathews* v. *Hickman*, 144.

HOMICIDE. See CRIMINAL LAW, 3.

HUSBAND AND WIFE.

1. *Fee-Simple—Gift to Wife and Children—Deeds—Wills.*—A gift to a wife and children, without more, vests a joint estate in the wife and children in equal portions. The language "to the mother and her children," standing alone, does not create a fee-simple in the mother. The mother is given a fee-simple only when it appears from the context, or from the whole instrument taken together, that such was the intention of the testator, or of the grantor, if the gift was by deed. *Goodloe* v. *Woods*, 540.

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2. *Wife's Land—Judgment Against Husband—Case in Judgment.*—The evidence in the case in judgment shows that no part of the purchase money for a house and lot sought to be subjected to the lien of a judgment against a husband was paid by him. He was never in a condition to pay it. On the contrary, the purchase was negotiated by the wife, the consideration was furnished by her, she was the reputed owner of the property, and, when sold to another, before she had acquired the legal title, the sale was negotiated by her. The husband had no interest in the property, and it is not liable to the lien of a judgment obtained against him. *Gent* v. *Pruner*, 536.

See CONTRACTS, 13; CRIMINAL LAW, 11, 12, 13; EVIDENCE, 11; MARRIAGE, 1.

ILLEGALITY. See CONTRACTS, 4, 10, 11.

IMPRISONMENT. See CONTEMPT, 1.

IMPROVEMENTS.

1. *Code, Section 2760—When Not Applicable.*—Section 2760 of the Code, allowing a defendant, under the conditions mentioned in that section, to file a petition to be allowed for improvements put upon land, while holding the same under a title believed by him to be good, applies only to actions of ejectment or to cases in which a decree or judgment is rendered against a defendant for land. The case in judgment is not an action of ejectment, but a suit in chancery, for the specific enforcement of an alleged parol cantract, and no decree has been rendered therein against the defendant for land, and hence the statute does not apply. *Branham* v. *Artrip*, 314.

See VENDOR AND PURCHASER, 3.

INDICTMENT. See CRIMINAL LAW, 5, 15, 18.

INFANTS.

1. *Revocation of Deed—Proof Required.*—Where the grantor in a deed was, at the date of the deed, on the border line of his majority and acted as an adult, making his own bargain and receiving his share of the purchase money, the evidence of his infancy at that time should be clear and satisfactory to justify a court in depriving an innocent purchaser for value and without notice of land of which he and his predecessors in title had been in undisputed possession for thirty-odd years without any intimation of an adverse claim,

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though the claimant lived in the neighborhood. *McCauley* v. *Grim*, 610.

2. *Trespassers.*—The rule that a land owner does not owe to a trespasser the duty of keeping his land in a safe condition applies as well to infants as to adults. *Lunsford* v. *Colonial Coal Co.*, 346.

See MASTER AND SERVANT, 3, 21.

INJUNCTIONS.

1. *Action on Bond—Damages Recoverable—Case at Bar.*—Damages recoverable in an action for breach of the condition of an injunction bond must be such as are the natural and proximate result of the issuance of the writ. In the case at bar, the damages awarded are not excessive, but are such as the evidence warranted. *Va. Beach Dev. Co.* v. *Commonwealth*, 280.

2. *Action on Bond—Liability of Obligors—Case at Bar—Damages Recoverable—Failure to Give Additional Bond.*—The liability of the obligors in an injunction bond is determined by the bond alone. In the case at bar, the condition of the bond, following the language of the statute, was "to pay all such costs as may be awarded against the party obtaining the injunction and all such damages as may be incurred in case the injunction shall be dissolved." The injunction was dissolved and the suit dismissed, for failure to give an additional bond, before this action was brought. The order for the additional bond was made pending a hearing of a motion to dissolve upon the merits of the case, after evidence had been taken, and as a condition of granting a motion of the defendant to give opportunity for taking further evidence.

   Held: In these circumstances the obligors in the injunction bond cannot escape liability to the plaintiffs on the theory that the injunction was dissolved because the new bond was not given, and not because the injunction was erroneously awarded. *Va. Beach Dev. Co.* v. *Commonwealth*, 280.

3. *Breach of Negative Covenants—Specific Performance.*—Where specific performance is the object of the suit, the general rule is that an injunction will not be granted to restrain a defendant from violating negative covenants when the agreement is of such nature that it cannot be specifically enforced. An injunction restraining the breach of a contract is a negative enforcement of that contract. *Langston M. Co.* v. *Times-Dispatch*, 797.

4. *Negative Covenants as to Chattels—Adequate Remedy At Law—Equity.*—If a contract relates to chattels, a court of

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equity will not enjoin a breach of its negative covenants unless the legal remedy of damages is inadequate. The fact that adequate remedy at law exists for the violation of an agreement is always sufficient to prevent the interference of equity. *Langston M. Co.* v. *Times-Dispatch*, 797.

INSANE PERSONS.

1. *State Hospitals—Trustee for Beneficiaries.*—A State hospital for the insane in this State is suable in its private capacity, and where it has seen fit to accept a trust, it stands on the same footing with respect to it as any other trustee. The legislature may prohibit it from accepting the trust, but, when once accepted, the trust subject must be applied to the purpose to which it has been dedicated by the grantor. *General Board* v. *Robertson*, 527.

See SANITY, 1, 2; TRUSTS AND TRUSTEES, 1.

INSOLVENCY. See CONTEMPT, 1, 2; CORPORATIONS, 3, 4.

INSTRUCTIONS.

1. *Abstract Propositions.*—It is not error to refuse an instruction which states an abstract proposition that could have been of no help to the jury in determining the question at issue. *Nesbit* v. *Webb*, 362.
2. *Credibility of Witnesses—Weight of Testimony.*—The office of an instruction given by a trial court is to guide the jury as to the law applicable to the case which the evidence tends to prove, and it should be so framed as to leave the jury untrammeled in passing upon the credibility of the witnesses and of the weight to be given to their testimony. *Ches. & O. R. Co.* v. *Chapman*, 32.
3. *Contradictory—Effect—Appeal and Error.*—Where contradictory instructions on a material point in a case have been given, the verdict of the jury should be set aside, as it cannot be known by which the jury were controlled. *Powhatan Lime Co.* v. *Alfleck*, 643.
4. *Correct Verdict.*—It is unnecessary to consider the rulings of the trial court on instructions where no other verdict than that rendered could have been properly found upon correct instructions. *Jacobs* v. *Warthen*, 571.
5. *Error—When Court to Correct—Negligence—Contributory Negligence.*—Where the evidence tends to show negligence on the part of the defendant and also contributory negligence on the part of the plaintiff, and the jury have been fully instructed as to the former, it is error to leave the jury uninstructed on the latter where the court has been re-

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quested to instruct on that subject, but the proffered instruction contains an erroneous statement of the law. The court ought to have corrected the proffered instruction or given one in lieu of it which as fully and distinctly submitted to the jury the theory of the defendant as to the contributory negligence of the plaintiff as the instructions given for the plaintiff submitted his theory of the negligence of the defendant. *Virginia R. Co.* v. *Bell*, 429.

6. *Evidence to Support.*—Instructions are properly refused when there is no evidence tending to prove the facts upon which they are based. *Peck* v. *Hampton*, 855.
7. *Evidence to Support.*—It is not error to refuse an instruction when there is no sufficient evidence on which to base it. *Virginian R. Co.* v. *Bell*, 429.
8. *Fully Instructed.*—It is not error to refuse to further instruct the jury when they have been fully instructed upon every phase of the case covered by the additional instruction proposed. *Nesbit* v. *Webb*, 362.
9. *Ignoring Evidence—Directing Verdict.*—An instruction which ignores the evidence in a case and directs a verdict for the plaintiff is properly refused. *Peck* v. *Hampton*, 855.
10. *Jury Fully Instructed.*—Where the jury has been fully and sufficiently instructed on every question involved in a case, it is not error to refuse other instructions tendered, even though they correctly state the law. *Bowman* v. *First Natl. Bank*, 463.
11. *Jury Sufficiently Instructed.*—When the jury have already been fully and sufficiently instructed on a given point in a case, it is not error to refuse other instructions, though correct, on the same point. *Luck Construction Co.* v. *Russell Co.*, 335.
12. *Read as a Whole—Different Theories of Case.*—Instructions are to be read as a whole, and if, when this is done, it is seen that the defendant's theory of the case was correctly and strongly presented, it is not error to give an instruction presenting the plaintiff's theory of the case. *Southern R. Co.* v. *Grubbs*, 876.
13. *Sufficiently Instructed.*—It is not error to refuse an instruction substantially covered by another instruction already given by the court. *Ches. & O. R. Co.* v. *Swartz*, 723.
14. *Sufficiently Instructed.*—It is not reversible error to refuse a correct instruction where the principle announced in it is sufficiently stated in another instruction given. *Middle Atl. Im. Co.* v. *Ardan*, 148.
15. *Sufficiently Instructed—Harmless Error.*—A party is not prejudiced by the refusal of the court to give a correct in-

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struction where, after reading other instructions to the jury, the court states the law to the jury substantially as requested in the rejected instruction. *Southern R. Co.* v. *Rice*, 235.

See APPEAL AND ERROR, 9, 15, 16; CARRIERS, 1; CONTRACTS, 7; DAMAGES, 1; MASTER AND SERVANT, 7; NEGLIGENCE, 2.

INSURANCE.

1. *Eleemosynary Associations—Beneficiaries—Interest of Subscriber.*—A certificate of membership in a wholly voluntary incorporated association, organized entirely for eleemosynary purposes, providing that the fund contributed upon the death of a subscriber shall be paid to such beneficiary as he may designate, with the right to change the beneficiary at pleasure, upon notice, and containing no provision, under any contingency, for payment of the fund voluntarily donated, in whole or in part, to the subscriber while living, or to his estate after his death, is not an ordinary life insurance policy. Under such a certificate, neither the estate of the subscriber nor his next of kin has any interest whatsoever in the fund where he fails to designate a beneficiary, or where the beneficiary designated dies before the subscriber, or has no insurable interest in his life, or for any other reason is not entitled to the fund. In all such cases the donation reverts to the association. Neither the subscriber in his lifetime, nor his personal representative after his death, has any property rights in the policy. He has only the power to appoint a beneficiary. *Smith* v. *Hatke*, 230.
2. *Evidence—Cause of Death—Physician's Certificate—Harmless Error.*—In an action on a life insurance policy it is not error to exclude from the jury the sworn statement of the attending physician in a proof of death as to the cause of death of the insured where death resulted from a gun-shot wound, and the physician knew no more about what caused it than anyone else who saw the dead body. But, even if such exclusion was error, it was harmless in the case at bar, as the physician was subsequently put upon the stand, and all he knew upon the subject was put completely and effectually before the jury. *South Atlantic Ins. Co.* v. *Hurt*, 398.
3. *False Representation of Age—Admission of Assured—When Admissible.*—In an action on a life insurance policy, where defense is made on the ground that the insured had falsely and fraudulently misrepresented his age or the condition of his health, his declarations as to his age or his health cannot be received in evidence against the beneficiary in the

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policy to prove the truth of the representations, but after evidence has been introduced tending to show that his age or health was different from what he represented it to be, such declarations may be received to show that he had knowledge of his age or the condition of his health and falsely and fraudulently misrepresented the same. *Merto. Life Ins. Co.* v. *O'Grady*, 830.

4. *Forfeiture—Failure to Pay Premiums—Application of Interest in Reserve Fund—Loans—Set Off.*—Upon a life insurance policy which had been in force seven years, the assured borrowed of the company $100. The policy subsequently lapsed for non-payment of a premium. At the date of the lapse there was a balance of $42.22 to the credit of the assured in the hands of the company from the reserve fund due him after deducting the loan of $100.00 and all other indebtedness to the company. The policy provided that the assured might, upon demand, have a policy written for the amount of paid up insurance specified in the policy less the amount of any indebtedness on the policy, or that the policy would, after the repayment of any indebtedness, be extended without request or demand, for the face amount thereof during the term provided in the policy, payable only if the insured died within said term. The $42.22 was sufficient to purchase paid up insurance to the amount of $105.00, or to extend the policy at its face value of $2000.00 for a period of one year and three months. The assured made no demand for a paid up policy and died within a year from the lapse of the premiums. The company continued to request the payment of the premium up to the death of the assured and after his death denied liability for any greater sum than one hundred and five dollars, insisting that the lapsed premium and the loan should have been paid out of other funds than the assured's interest in the reserve.

Held: The assured not having demanded a paid up policy, the policy was automatically kept in force for a year and three months, and, the assured having died within that period, his personal representative is entitled to recover the full face value of the policy. The assured had the right to set-off the amount due him by the company against what he owed the company, in the absence of any agreement to the contrary, as might have been done in any other case between a debtor and creditor. Insurance companies who lend money to their policyholders stand in no different position from other lenders. *Stratton* v. *N. Y. Life Ins. Co.* 257.

5. *Fraudulent Answers—Physical Diseases—Insanity—Case at Bar.*—Untrue answers to questions propounded on an appli-

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cation for a life insurance policy, in order to be fraudulent, must be wilfully false. In the case at bar, the collocation of the question, "Have any of your uncles or aunts had consumption, or any hereditary disease?" would seem to indicate that the inquiry was directed to physical diseases, and not to diseases of the mind, as insanity. *South Atlantic Ins. Co.* v. *Hurt*, 398.

6. *Insurable Interest—Officer of Corporation—Loss of Services—Premium Paid by Corporation—Ultra Vires Act.*—An insurance policy taken out in good faith by the principal incorporator of a corporation, who was also its president and general manager, for the benefit of the corporation which paid the premium in order to protect the corporation and its creditors by reason of his death, is not *ultra vires* on the part of the corporation, and the "loss of services in the event of death," if real, is a sufficient interest in the life of the insured to maintain the policy in favor of the beneficiary. *Mutual Life Ins. Co.* v. *Board*, 836.

7. *Insurable Interest—What Constitutes.*—Any reasonable expectation of pecuniary benefit or advantage from the continued life of another, whether direct or indirect, creates an insurable interest in such life, though there be no claim upon the person whose life is assured that can be recognized at law or in equity. The essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the assured has no interest. *Mutual Life Ins. Co.* v. *Board*, 836.

8. *Liens—Forfeiture—Renewal of Policy.*—Where the payment of each annual assessment on an insurance policy is a renewal of the policy, the fact that when the policy was first issued there were undisclosed liens on the property insured did not work a forfeiture of the policy where several annual assessments were paid after the liens were discharged. *Mutual Fire Ins. Co.* v. *Turner*, 631.

9. *Loan Agreement — Forfeiture — Waiver.*—The "loan agreement" in the case at bar, under which the assured borrowed $100.00 of the insurance company, did not waive, either expressly or impliedly, any of the "non-forfeiture" privileges of the assured under his policy. *Stratton* v. *N. Y. Life Ins. Co.*, 257.

10. *Medical Examiner—Agent of Insurer—Knowledge.*—The medical examiner of a life insurance company who writes in the application the answers of the applicant for the policy to the questions propounded to him is the agent of the company, and the company is bound by any information he has at the time he fills out the application for the insured.

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In the case at bar, the medical examiner of the company was thoroughly familiar with all the facts as to which it is alleged the insured made false answers. *South Atlantic Ins. Co.* v. *Hurt*, 398.

11. *Notice—Reasonableness.*—If any question of reasonableness of the method of giving notice in the case at bar should have been submitted to the jury at all, it should have been the reasonableness of the course adopted, not of a course not adopted. *Mutual Fire Ins. Co.* v. *Turner*, 631.

12. *Notice of Assessments—Sufficiency—Custom—Case at Bar.*—Where the by-laws of a mutual fire insurance company are made a part of each policy of insurance issued by the company, and they provide that mailing notice of assessments "to the post-office address given it by the member in the application for insurance (and in case of change of same, such address as the member shall, in writing, furnish the secretary) shall in all cases be sufficient notice to such member," a printed notice, inclosed in an open one-cent envelope, addressed to the member at the address given in the application, is a sufficient notice under the by-law, when the member had not, in writing, furnished the secretary of the company any other address. The fact that the member was absent from home when the notice was mailed, and had left instructions with the postmaster at her home address to forward her mail; that two former notices had been on post-cards, which were forwardable mail matter, but the notice in the one-cent envelope was not forwardable does not change the result, as the notice was given in the manner provided by the contract of insurance. The receipt of two notices by post-card was wholly insufficient to justify the member in supposing that the company had adopted as a rule the post-card method of sending notices, and would never employ any other method. *Mutual Fire Ins. Co.* v. *Turner*, 631.

13. *Policy—Forfeiture.*—The policy in suit was not automatically forfeited. In order to effect a forfeiture of it some affirmative action on the part of the insurer was necessary during the currency of the policy, but none was taken. *Stratton* v. *N. Y. Life Ins. Co.*, 257.

14. *Policy Strictly Construed.*—The maxim that the words of an instrument shall be taken most strongly against the party employing them, is peculiarly appropriate in the construction of a policy of insurance. The instrument is wholly the work of the underwriter and is usually filled with a multitude and variety of stipulations seldom read by the assured when he accepts the policy, and, if read, rarely, if ever.

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understood, abounding in forfeitures and in provisions generally harsh and difficult of performance, and hence it should be strictly construed against the insurer and liberally in favor of the insured. *Stratton* v. *N. Y. Life Ins. Co.*, 257.

15. *Suicide—Burden of Proof—Circumstantial Evidence of Death.*—Where the defense to an action on a life insurance policy is that the defendant committed suicide, the burden is upon the defendant to show by clear and satisfactory evidence that the insured did actually commit suicide. A mere preponderance of the evidence is not sufficient. The mere fact that the body of an insured is found with a pistol in his hand and a bullet wound in his head is not sufficient to prove suicide. When the evidence of self-destruction is circumstantial, the defendant fails unless the circumstances exclude with reasonable certainty any hypothesis of death by accident. *South Atlantic Ins. Co.* v. *Hurt*, 398.

16. *Suicide—Question for Jury.*—Where the suicide of the insured is the issue in an action on a life insurance policy, and the proof (while tending to show suicide) does not exclude, with reasonable certainty, death from accident, it is proper to leave to the jury to say whether or not it was a case of suicide, as the burden on such issue is on the defendant, *South Atlantic Ins. Co.* v. *Hurt*, 398.

See LIFE ESTATES, 1.

INTEREST.

1. *Liability For—Private Persons—State—Counties.*—As a rule the common law did not imply a promise to pay interest, and interest could not be recovered save where it was expressly contracted for; and while a different rule prevails in this State as between natural persons and private corporations, it has not been extended to claims against the State or a county where there is no provision in the statute or authorized agreement creating the liability for the payment of interest. Claims disallowed by the supervisors of a county do not bear interest in the absence of some authorized agreement for its payment. *Lynchburg* v. *Amherst County*, 600.

See LIFE ESTATES, 2.

INTERNAL IMPROVEMENTS. See CONSTITUTIONAL LAW, 5.

INTERSTATE COMMERCE. See CARRIERS, 4.

INTOXICATING LIQUORS. See CRIMINAL LAW, 1, 5, 6, 18.

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INVITEES.

1. *Unsafe Premises—Liability of Owner or Occupier.*—The owner or occupier of land, who, by invitation, express or implied, induces or leads others to come upon his premises for any lawful purpose is liable in damages to such persons (they using due care) for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public or to those who were likely to act upon such invitation. *Nesbit* v. *Webb*, 362.

See NEGLIGENCE, 7.

JOINDER. See PLEADING, 8.

JOINT PROPERTY.

1. *Powers Over—Private Persons—Cities—Counties.*—There is marked difference between the rights and duties of natural persons in respect to their joint property and the rights and duties which exist between a city and a county as to their joint property. Natural persons can do anything in respect to their common property not forbidden expressly or impliedly by law. In the case of a city and a county in reference to their joint property, the powers possessed and the duties imposed are all statutory. They are only such as are expressly provided by the statute or necessarily implied, and this is especially true with reference to a county which is a mere sub-division of the State. *Lynchburg* v. *Amherst County*, 600.

JOINT TENANTS.

1. *Deeds—Severance of Title.*—While a joint tenant has capacity to transfer his undivided share in the land, he has no right to convey by metes and bounds any part of the land, or to convey the mineral and reserve the surface to the prejudice of his co-owners. A conveyance from one joint tenant of land owned in fee to a stranger cannot effect a serevance of his interest in the land from that of the other joint tenants, but makes the grantee a tenant in common with the other joint tenants, and *a fortiori*, a like conveyance of his mineral interest only cannot operate a severance of his mineral interest from the surface. *Va. Coal & Iron Co.* v *Hylton*, 418

2. *Purchase of Title by One.*—A co-owner of property cannot purchase an outstanding title except for the common benefit. If such owner pays off an encumbrance on the property and takes a deed to himself, he holds the title for all the co-owners, but is entitled to credit for such payment in any

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settlement thereafter made with them. *Goodloe* v. *Woods*, 540.

See DEEDS, 11.

JOINT WRONGDOERS. See TORTS, 1.

JUDGMENTS.

1. *Collateral Attack.*—The decree of a court of competent jurisdiction, with all of the parties before it, settling the rights of parties, their estates under a will, and the powers of the parties over such estates, cannot be collaterally assailed. *Goodloe* v. *Woods*, 540.
2. *Res Judicata.*—Where one was a party to another litigation in which his title to a tract of land was put in issue and decided against him, the matter as to him is *res judicata*. *McCauley* v. *Grim*, 610.
3. *Stare Decisis—Old Cases—Weight Given.*—The fact that a case is old does not affect its value or authority, and where it appears to have been carefully considered and well supported by authority, and is in accord with modern decisions in other States, it should not be regarded as overruled by a subsequent case in conflict therewith which makes no reference to it, and in which the question decided does not appear to have been carefully considered. *May* v. *Sherrard*, 617.

See APPEAL AND ERROR, 17, 20; ATTACHMENTS, 3; DEEDS, 1; DIVORCE, 1; HUSBAND AND WIFE, 2; JOINT TENANTS, 2; RES JUDICATA, 4; SALES, 7.

JUDICIAL NOTICE. See PROCESS, 2, 3.

JUDICIAL SALES.

1. *Rights of Purchaser.*—A purchaser at a judicial sale takes only the rights or interest of the parties before the court, and persons not before the court are not bound in any way by the proceedings. *Goodloe* v. *Wood*, 540.

JURIES AND JURORS.

1. *Discretion.*—The granting or refusing to grant a special jury is a matter resting in the sound discretion of the trial court whose action will not be disturbed where it does not appear that the discretion was abused or the parties prejudiced thereby. *Lemons* v. *Harris*, 809.
2. *Selection.*—The rule of the common law is that no one should take part in the selection of jurors who does not stand indifferent between the parties, and there is nothing in our statutes which changes that rule. *Patrick's Case*, 933.

See CRIMINAL LAW, 8, 9, 16, 19, 20, 21, 22, 23.

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JURISDICTION. See CRIMINAL LAW, 7; DEMURRER TO EVIDENCE, 5; EQUITY, 5, 7.

LACHES. See EQUITY, 6; FRAUD AND FRAUDULENT CONVEYANCES, 1.

LANDLORD AND TENANT.

1. *Building by Lessee—Lessor to Take at Valuation—How Value to Be Ascertained in Case at Bar.*—If a lessee covenants to erect buildings on the leased premises to cost not less than $2,000 nor more than $3,000, and the lessor covenants that at the termination of the lease he will take the buildings so to be erected at a fair valuation to be ascertained by considering what it would cost to erect them at the time of such valuation, and deducting therefrom a reasonable allowance for the wear and tear thereof, this does not require the appraisers to start with a mixiumum valuation of $3,000 for the buildings and deduct therefrom the reasonable wear and tear, but the appraisers are to take the estimated costs at the time of valuation, whatever that may be, and deduct therefrom the reasonable wear and tear, and the balance to an amount not exceeding $3,000 is what the lessor is to pay. That is the utmost extent of his liability, although, at a fair valuation, the building may be worth much more, but the limitation was not designed, nor has it the effect, to prevent the recovery by the lessee of the fair value of the buildings at the time of their surrender to the lessor, provided such value is not in excess of $3,000. *Newton* v. *White*, 844.
2. *Goods of Under-Tenant—Liability for Rent Due or to Become Due.*—Section 2791 of the Code plainly makes the goods of the under-tenant liable for the rent, just as though they were the goods of the tenant himself; and by section 2962 it is provided that, if the goods are liable to be distrained, they may be attached. The intention of the legislature was to give as effective a remedy for rent to become due as for rent past due. *Bernard* v. *McClanahan*, 453.
3. *Lease—Construction—Intention of Parties.*—The language of a lease which is fairly susceptible of two constructions, is to be taken most strongly against the lessor. Furthermore, the intention of the parties must be ascertained by reference to the entire instrument and not to disjointed parts of it. *Stonegap Colliery Co.* v. *Kelly*, 390.
4. *Premises—Collateral and Customary Use—Case in Judgment—Mining Lease—Use of Surface—Buildings for Employees.*—As a general rule, the lessee of real property is entitled to the use of the demised premises for such collateral purposes as are customary in the use of such property, and for any

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purpose not prohibited by the lease and not amounting to waste or destruction of the subject matter. In the case in judgment, notwithstanding the isolated statement that the lease was "for the purpose of mining coal and manufacturing coke thereon and therefrom, and selling said coke and coal," looking to the lease as a whole and the customary use of such property, it was the intention of the parties that the lessee should have, for the purpose of its operations, all of the property rights and privileges owned by the lessors in the premises, and is not accountable to them for the rents of houses which it caused to be erected on the leased premises in the neighborhood of its operations, and which it leased to another until it became necessary for it to use them for its own employees. *Stonegap Colliery Co.* v. *Kelly*, 390.

5. *Property of Under-Tenant—Liability for Rent.*—The liability of the property of an under-tenant of leased premises for rent contracted to be paid by the tenant does not arise out of contractual relations between him and the lessor, but by virtue of the statute whereby he, upon entering the leased premises as under-tenant, subjects his property carried thereon to liability for rent contracted to be paid by the lessee of the premises, and this liability of his property continues while on the leased premises, and for thirty days after the same is removed therefrom, but it cannot be subjected for a greater amount than one year's rent, due or to become due, from the lessee to the lessor. *Bernard* v. *McClanahan*, 453.

6. *Sale of Goods by Tenant—Liability for Rent.*—Although there is no rent due when a lessee sells his entire stock on the leased premises, nevertheless there is a liability on the contract of the lessee for the rent and the goods are taken by the assignee or under-tenant subject to and liable for one year's rent reserved to the lessor in the contract. *Bernard* v. *McClanahan*, 453.

7. *Tenant From Year to Year—Covenants of Grantor—Continuation.*—Where property is leased for a fixed and definite term, and the lessor agrees to take at valuation, at the end of that term, buildings to be erected on the leased premises by the lessee, and the tenant is permitted to hold over from year to year for six years without any new contract, express or implied, this carries with it a continuation of the lessor's promise to pay for the buildings at the termination of the relation of landlord and tenant. The law presumes the holding to be upon the terms of the original lease, subject to the same rent and to the covenants of the original

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lease, so far as applicable to the new condition of things. *Newton* v. *White*, 844.

See CONTRACTS, 2, 3, 10, 11.

LAST CLEAR CHANCE. See RAILROADS, 2.

LEASE. See LANDLORD AND TENANT.

LEGACY. See WILLS, 10, 13, 14, 15.

LETTERS. See EVIDENCE, 13.

LICENSE. See TAXATION, 7.

LICENSEES. See NEGLIGENCE, 5, 7, 8; RAILROADS, 5, 7.

LIENS. See INSURANCE, 8; TRUSTS AND TRUSTEES, 3; UNITED STATES, 1.

LIFE ESTATES.

1. *Insurance on Buildings—Case in Judgment.*—Whether a court of equity can, in any case, impose upon a life tenant the burden of insuring buildings on real estate for the benefit of the remaindermen is unnecessary to decide in this case, as the situation of the testator's property in the case at bar does not warrant such a requirement of the life tenant. *Kincheloe* v. *Gibson*, 119.
2. *Interest on Encumbrances—Who to Pay—General Rule—Exceptions.*—As a general rule, a tenant for life of property subject to incumbrances must keep down the interest accruing on such encumbrances during the continuance of his estate, but the doctrine is qualified where, as in the case in judgment, there is a general charge of all of testator's debts on his real estate, in the event the personal property proves insufficient to pay them. In such case the general doctrine does not apply. Here the life tenant ought not to be disturbed until a change of possession is made necessary in fulfillment of the charge imposed on this property by the will, or until mismanagement thereof or misapplication of its profits, render it improper that he should hold the possession any longer. *Kincheloe* v. *Gibson*, 119.

See WILLS, 1.

LIME. See CONSTITUTIONAL LAW, 3, 4.

LIMITATION OF ACTIONS.

1. *Banks—Negligent Bank Directors May Plead—Trusts.*—Directors of a bank, which is a going concern, are not trustees of

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an express trust, with respect to the property or funds of the bank, but of an implied or resulting trust created by operation of the law upon their official relation to the bank, and the statute of limitations and the doctrine of laches may be invoked in their defense when sued for a breach of such trust. *Winston* v. *Gordon*, 899.

2. *Bank Directors—Statute Applicable—When Right of Action Accrues.*—The cause of action against the directors of a bank for neglect of duty as such directors does not grow out of contract but out of their breach of duty, and hence the statute of limitations of three years does not apply, but the wrongs which constitute the cause of action are damages to property revivable upon the death of either party, and the limitation applicable thereto is five years, as provided by section 2927 of the Code. Where fraud is neither alleged nor proved, and no concealment of liability on the part of the defendants is shown, the act of limitations begins to run from the time the alleged wrongs, if any, were committed. *Winston* v. *Gordon*, 899.
3. *Burden of proof.*— The burden is on the pleader of the statute of limitations to make out a case to which the statute clearly applies. *Virginia Ry. & P. Co.* v. *Ferebee*, 289.
4. *Life Estate—Fee-Simple—Merger—When Statute Begins to Run.*—Possession under a claim of title for a period of fifteen years ripens into a perfect title as well against a life tenant as against others, and if such possessor also has title to the remainder in fee, the fee merges the lesser estate, and the statute of limitations against one claiming an interest as a remainderman begins to run from the time of the merger, and not from the death of the life tenant. *McCauley* v. *Grim*, 610.
5. *Injury to Property—Nuisance—Cesspools.*—The limitation to an action to recover damages for injury to the plaintiff's property by reason of cesspools constructed and maintained by the defendant on his land adjacent to that of the plaintiff is five years, and pleas setting up the statute of limitations of one year and three years, respectively, are bad, and, if objected to, should be rejected. *Hawling* v. *Chapin*, 792.

See TENANTS IN COMMON, 4.

LOCAL OPTION. See CRIMINAL LAW, 7.

LODGER. See TAXATION, 15.

LOST INSTRUMENT. See ALTERATION OF INSTRUMENTS, 3.

MAIL CLERK. See CARRIERS, 7.

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MARRIAGE.

1. *Slaves—Issue Legitamated—Proof of Agreement to Live Together.*—Slaves cannot contract, hence their marriages are void. By an act of February 27, 1866, the issue of colored persons who had cohabited together as man and wife, and were then so cohabiting were legitimated whether the rites of marriage had been celebrated between them or not. Under this statute, it is not necessary to prove an agreement *in terms*, that the parties will take one another as husband and wife, but the fact of the relation existing may be established by the acts, conduct and conversation of the parties. *Lemons* v. *Harris*, 809.

MASTER AND SERVANT.

1. *Boss of Gang—Vice-Principal—Safe Place.*—Ordinarily the foreman or boss of a gang of hands employed in executing the master's orders is a mere fellow-servant with the other members of the gang, but if he is discharging a non-assignable duty of the master he is to that extent a vice-principal. One of these non-assignable duties is to exercise ordinary care to provide a reasonably safe place in which the servant is to work. If the place was originally safe, but has become unsafe during the absence of the servant, and he is ignorant of this fact, and cannot discover it by the exercise of ordinary care, it is the duty of the master to inform him of it, and, in his absence, this duty devolves upon the foreman of the gang, as vice-principal. *Stonega C. & C. Co.* v. *Williams*, 657.
2. *Contributory Negligences—Obvious Risk.*—To attempt to operate a dangerous machine driven by steam in the dark without sufficient light is such an open and obvious risk that no prudent person would encounter the peril. When an employee is injured under such circumstances he cannot escape the result of his own contributory negligence upon the ground that he was acting under orders of the master when obedience to those orders involves exposure to danger so apparent that no prudent person would incur the risk. *Ricker* v. *Southern R. Co.*, 201.
3. *Dangerous Place—Youthful Employee—Contract of Employment—Negligence.*—If a manufacturing company, some of whose work is of dangerous character, stipulates with the father of an inexperienced young boy that he shall be employed only in certain designated departments of the work not dangerous, it is negligence on the part of the company to expose the boy to risks different from those incident to his contract of employment in the performance of duties for

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which he was unfitted by reason of lack of experience and skill. *Powhatan Lime Co.* v. *Affleck*, 643.

4. *Death of Servant—Violating Speed Ordinance—Negligence—Railroads.*—An engineman of a railway company cannot recover damages from his employer for injuries suffered while running his engine within the limits of a city at a higher rate of speed than that fixed by the ordinance, if such negligence proximately contributed to the injury, and it is immaterial that the company knew that the ordinance was regularly violated by its employees. The negligence in such case is negligence as a matter of law, and it would be contrary to public policy to relieve the engineman of the effect of his violation of law upon the ground that the company and its employees were in the habit of violating the particular law. *Southern R. Co.* v. *Rice*, 235.

5. *Defective Appliances—Proximate Cause—Case at Bar.*—A plaintiff cannot recover on account of defective machinery or appliances, unless it affirmatively appears that the defect was the proximate cause of the injury complained of. In the case at bar, a hand torch was provided by the defendant for the use of the plaintiff in emergencies caused by the adsence of the electric lights, and it is alleged that the injury was inflicted upon the plaintiff while using this torch, but there is no allegation that the torch was out of order, that it did not give sufficient light, that it was in any way inadequate for the purpose for which it was being used, or that the use of the torch caused the injury, and hence no case is stated against the defendant. *Recker* v. *Southern R. Co.*, 201.

6. *Fellow-Servants—Railroads.*—By the express terms of section 162 of the Constitution of Virginia a railroad employee is declared not to be the fellow-servant of a co-employee in charge of a locomotive engine. *Ches. & O. R. Co.* v. *Swartz*, 723.

7. *Injury to Car Repairer—Avoidable Injury—Instructions.*—In an action by a car repairer for an injury inflicted on him by backing the engine attached to the car he was repairing after a blue light had been put on the car, indicating his presence, it is not error to refuse to instruct the jury "that if, upon the evidence, the plaintiff could have avoided the injury by waiting till the engine was uncoupled, he could not recover" where the undisputed evidence was that the plaintiff went under the car in the proper discharge of his duty as car repairer, and also in obedience to the express command of the car inspector, whose orders he had been specifically directed to obey. *Ches. & O. R. Co.* v. *Swartz*, 723.

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8. *Mines—Method of Work—Knowledge of Servant—Common Knowledge.*—In an action to recover for the negligent death of a miner killed by stone and earth caving in on him while at work in the mines, it was not to the prejudice of the plaintiff that the defendant was permitted to show that the method adopted by the defendant of pinning up the cracks in the walls, and of inspecting the walls, was a matter of general knowledge among all of the employees of the defendant engaged at that place, and was generally and commonly known. *Bowles* v. *Va. Soapstone Co.*, 690.

9. *Negligence of Fellow-Servant—Virginia Constitution and Statute.*—A declaration in an action against a railroad company which charges that the relation of master and servant existed between the defendant and the plaintiff: that the plaintiff at the time of the injury was engaged in work on a car, and that the injury sustained was occasioned by the negligence of the hostler, a fellow-servant in charge of a locomotive engine, states a case for recovery by the plaintiff under section 162 of the Constitution and section 1294-k of the Code. *Ches. & O. R. Co.* v. *Swartz*, 723.

10. *Negligence of Master—Evidence—Unforeseeable Event—Case at Bar.*—Negligence must be established by affirmative evidence, which must show more than a mere probability of a negligent act. The existence of negligence must not be left wholly to conjecture, and, in determining whether or not an act or omission of the master was negligent, it must be borne in mind that the master is not compelled to foresee and provide against that which reasonable and prudent men would not expect to happen. In the case at bar, the injury complained of could not have been anticipated and provided against by a reasonably prudent man, but was a pure accident. The plaintiff was injured by a blast of which he had ample warning and from which he had ample opportunity to escape, but took refuge in a place which he regarded as safe, and was injured in consequence of a peculiar rebound of a stump blown out by the blast, and hence cannot recover. *Yellow Poplar L. Co.* v. *Goble*, 682.

11. *Personal Injury—Negligence—Accident.*—Negligence of the master cannot be inferred from the mere occurrence of an accident by which his servant is injured. That fact alone does not raise even a *prima facie* presumption that the master has been guilty of negligence or a breach of duty to his servant. Negligence of the master is an affirmative fact to be established by the injured servant. *Yellow Poplar L. Co.* v. *Goble*, 682.

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12. *Risks Assumed by Servant.*—An employee only assumes the risks ordinarily incident to the service, and those known to him or so obvious as to be readily observed by one of his age, experience and mental capacity in the exercise of ordinary care. *Stonega C. & C. Co.* v. *Williams*, 657.

13. *Risks Not Incident to Contract—Contributory Negligence—Estoppel.*—Although a master may have been negligent in exposing a servant to risks not incident to his contract of employment, he is not thereby estoppel from setting up the contributory negligence of the servant as a bar to an action for personal injuries received by him while so exposed. If the servant has been guilty of negligence which proximately contributes to his injury he cannot recover. *Powhatan Lime Co.* v. *Affleck*, 643.

14. *Safe Place—General Custom—Stone Quarry—Case at Bar.*—The evidence in the case at bar shows that the use of iron pins put into the walls or sides of a stone quarry along the lower edge of a seam discovered in said walls, as a means of supporting the walls and preventing the fall of stone, was sanctioned by general custom as a sufficient precaution against the fall of stone under the conditions existing at the time of the accident under investigation, and, together with other precautions taken to keep the mine in a reasonably safe condition, further shows that the defendant discharged the duty imposed upon it to use reasonable care to furnish and keep a place reasonably safe for the performance of the duties committed to its employees. *Bowles* v. *Va. Soapstone Co.*, 690.

15. *Safe Place—General Practice of Others—Individual Practice.*—In determining the question whether or not the master has exercised ordinary care in providing a reasonably safe place for the servant to work, the general practice of employers in similar lines of employment is admissible in evidence, but the act of a particular corporation or individual cannot be introduced to show that the master has or has not exercised that degree of care which the law requires in such case. *Bowles* v. *Va. Soapstone Co.*, 690.

16. *Safe Place—Injury to Car Repairer—non-Assignable Duty—Negligence of Engineer—Proximate Cause*—Independently of statute, the master owes to the servant the non-assignable duty of using ordinary care to furnish him a reasonably safe place in which to perform his work, and if the hostler in charge of a train directs an inexperienced fireman to back the engine in order to give slack for uncoupling, and he does it negligently, thereby injuring a repairer under the train who had given due notice of his presence, the master

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is liable. The omission of the hostler to discharge his duty was, in legal contemplation, the proximate cause of the injury as between the plaintiff and the defendant, and the negligence of the fireman was but a link in the chain of causation. It is not the negligence of the fireman for which the company is liable, but the dominant negligence of the hostler, who was the defendant's *alter ego*. For discussion of "proximate cause" see opinion of Whittle, J. *Ches. & O. R. Co.* v. *Swartz*, 723.

17. *Safe Place—Mines—Quarries.*—An employer is not an insurer of the safety of the employee. His duty is performed if he exercises reasonable care to provide a reasonably safe place in which the employee is to do his work, and exercises reasonable care and supervision to see that a reasonable condition of safety is preserved. These principles apply with peculiar force to mines and quarries, for in them conditions are never at rest. Everything is in a condition of change, so that both the employer and the employee must be upon the alert to guard against danger. *Bowles* v. *Va. Soapstone Co.*, 690.

18. *Tort of Servant—Damages—Compensation—Punishment*—The master is liable to make *compensation* for injuries done by his servant, within the scope of his employment, although not previously authorized nor subsequently ratified by the master, but he cannot be held for exemplary or punitive damages merely by reason of wanton, oppressive or malicious intent on the part of his servant. In order to subject the master to *punitive* damages for the act of his servant, the act must have been previously authorized or subsequently ratified by the master. *Southern R. Co.* v. *Grubbs*, 876.

19. *Tort of Servant—Failure to Discharge—Ratification.*—The mere failure of the master to discharge his servant after the commission of a wrongful act by the servant does not constitute a ratification of such act. *Southern R. Co.* v. *Grubbs*, 876.

20. *Unsafe Place—Knowledge of Vice-Principal—Demurrer to Evidence.*—Since the jury might have found that the vice-principal of the defendant had knowledge of the danger to which the plaintiff was subjected, and that the proximate cause of the plaintiff's injury was the negligent failure of the vice-principal to give him warning of such danger, this court, upon a demurrer to the evidence by the defendant, must so find. *Stonega C. & C. Co.* v. *Williams*, 657.

21. *Voluntary Services—Compensation—Implied Contract.*—A boy who voluntarily seeks employment in a household to clean shoes, brush clothes and do other incidental things about the

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house, and is accepted for that purpose, with nothing said as to compensation by either party, occupies the position of servant, and there is an implied contract on the part of the master to feed, clothe and lodge him, for otherwise he could not serve; but the law will not imply a contract to make any other compensation for such services, and, if there is no express contract, there can be no recovery therefor. *Starke* v. *Storm*, 651.

See EVIDENCE, 20, 21, 23, 24; NEGLIGENCE, 3; PLEADING, 5; RAILROADS, 4, 6.

MASTER'S REPORT. See EQUITY, 9.

MECHANIC'S LIENS.

1. *Affidavit of Agent—Sufficiency—Case in Judgment.*—At the end of an itemized account for a mechanic's lien are these words: "After deducting the credits from the debits, leaves the balance, $7,041.93, due to John Diebold & Sons' Stone Company, Inc., with interest thereon from the 6th day of January, 1911, until paid. (Signed) John Diebold, President and Agent for John Diebold & Sons' Stone Co., Inc., Affiant." Immediately following this is the certificate of the notary, which says: "Personally appeared before me, in my city aforesaid, Mr. John Diebold, and made oath that the matters and things stated in the foregoing account are true, and that the said account is correct."

   Held: It sufficiently appears that the affiant was acting as the agent of the corporation claiming the mechanic's lien, and the affidavit is sufficient to support said lien. *Diebold* v. *Tatterson*, 766.

MERGER. See LIMITATION OF ACTIONS, 4.

MINES AND MINERALS.

1. *Seam—Crack.*—A seam, in mining, is a thin layer or stratum, a narrow vein between two thicker strata. It differs from a crack because there is no actual parting of the substance in which the seam appears, though a seam may develop into a crack. *Bowles* v. *Va. Soapstone Co.*, 690.
2. *Cracks in Walls—Inspection—Sounding.*—Inspection by sounding to ascertain the extent and danger attending the presence of a crack in a stone quarry seems to be the usual and customary method observed in such case. While not in-

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fallible, yet, in the endeavor to ascertain conditions that are inaccessible to sight or touch, the sound that is given back by a blow upon the surface of the rock is the safest means of ascertaining whether it is a solid mass or is interrupted by a seam or crack. *Bowles* v. *Va. Soapstone Co.*, 690.

3. *Quarries—Cracks—Securing by Pins—Customary Methods.*—Pins such as were used in the case at bar are in general use where a seam is disclosed in the walls of a quarry and are relied upon by those engaged in quarrying—not that they afford an absolute assurance of safety, but that in dealing with unknown conditions experience has shown that they are usually an efficient aid in promoting safety. *Bowles* v. *Va. Soapstone Co.*, 690.

4. *Quarries—Cracks—Test of Core Drills.*—A core drill is a hollow cylinder armed with black diamonds which is made to revolve with great rapidity, with the result that when driven into a stone surface a core is found in the midst of the cylinder, and the theory is that by taking out a core it will show the constitution of the mass from which it is taken and whether seams or cracks exist in it. But fractures in the core are often produced by the operation of the drill itself, and hence it is not an infallible test of the condition of the mass. *Bowles* v. *Va. Soapstone Co.*, 690.

See ADVERSE POSSESSION, 1; DEEDS, 11; EVIDENCE, 18; LANDLORD AND TENANT, 4; MASTER AND SERVANT, 8, 14, 17; TAXATION, 11; TENANTS IN COMMON, 3.

MISTAKE. See CONTRACTS, 8; VENDOR AND PURCHASER, 4.

MORTGAGES.

1. *Absolute Deed a Mortgage—Presumption.*—While a deed absolute on its face may be shown to be a mortgage, the settled doctrine in this State is that the presumption is that the deed is what, upon its face, it purports to be, and to overcome this presumption the evidence must be clear, unequivocal and convincing. *Hill* v. *Saunders*, 60.

MOTION FOR JUDGMENT.

1. *Motion Under Section 3211 of Code—Stock Subscription.*—An unconditional and unqualified promise to pay for stock in a corporation, as and when called for by the board of directors, may be enforced by a motion under section 3211 of the Code. *Eichelberger* v. *Mann*, 744.

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2. *Work and Labor—Motion under Section 3211 of Code.*—A motion may be made under section 3211 of the Code to recover the price of work done and materials furnished in excavating for a sewer. *Richmond* v. *Burton*, 206.

MULTIFARIOUSNESS. See EQUITY, 2, 3.

MUNICIPAL CORPORATIONS.

1. *Councilmen of Cities—State Officers.*—While many, perhaps the great body, of the powers and duties of city councils relate exclusively to the local affairs of their respective cities and to matters in which the city alone is interested, they exercise powers and perform duties in which the public at large, the State, is interested directly. They are for many purposes State agencies or instrumentalities, operating to some extent through the medium of city charters in the preservation of public peace and good government. *Lambert* v. *Barrett*, 136.
2. *Member of City Council—Vacancy—Code, Section 1015-e—Repeal—Act, February 17, 1906.*—A member of a city council is not a municipal officer within the meaning of the act of February 17, 1906, providing, amongst other things, how vacancies in such offices shall be filled, and hence said act does not repeal section 1015-e of the Code declaring how vacancies in the council shall be filled. *Lambert* v. *Barrett*, 136.
3. *Power of State Over Streets—Paving by Street Railway—Charter Obligation—Release by Ordinance—Ultra Vires Act.*—The powers of a municipal corporation with respect to its streets are continuing and inalienable, and where the charter of a street railway company imposes upon the company the duty of keeping certain portions of the streets well paved and in good order, without expense to the city, a city ordinance which undertakes to relieve the company of such duty, in whole or in part, is *ultra vires* and void. The legislature has supreme control over streets, subject to constitutional restrictions, while to the city is delegated the power to hold them as trustee for the general public and to keep them in repair for public convenience and safety. *Norfolk & P. Co.* v. *Norfolk*, 169.
4. *Ultra Vires Ordinance—Estoppel.*—If a city ordinance be *ultra vires* and void, it cannot operate as an estoppel. *Norfolk & P. Co.* v. *Norfolk*, 169.

See CONTRACTS, 1, 5; EVIDENCE, 23, 24, 26; MASTER AND SERVANT, 4; STREET RAILWAYS, 5.

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MURDER. See CRIMINAL LAW, 17.

NAVIGABLE WATERS.

1. *Bridge—Authority of Legislature.*—Where a bridge has been built over a navigable stream under authority of an act of the legislature, the expediency of building the bridge is not thereafter an open question. *Peek* v. *Hampton*, 855.
2. *Land Between Low Water and Navigability—Ownership—Injury to—Damages.*—While the fee-simple title of a riparian owner on navigable water ends at low water mark, yet between that point and the line of navigability he has a right known as riparian right, which is valuable, and, when once vested, the owner cannot be deprived of it, except for the public good, and, if taken or injured for the public good, the owner is entitled to due compensation. This riparian right is not a mere easement to pass over the water or a privilege to use the surface, but is property in the soil under the water. Upon it the owner may fasten or build structures, such as wharfs, piers or bulkheads, to the line of navigation. If any of these property rights are depreciated in value by reason of the construction and maintenance of bridges by others, the owner is entitled to recover damages therefor. *Peek* v. *Hampton*, 855.

NEGLIGENCE.

1. *Burden of Proof—Personal Injury.*—In an action to recover damages for a personal injury, negligence will not be presumed, but the burden rests upon the plaintiff to prove it affirmatively and by a preponderance of the evidence. *Steele* v. *Colonial Coal Co.*, 385.
2. *Contributory Negligence—Instructions.*—Where there is evidence in a case tending to show such contributory negligence on the part of the plaintiff as would bar his recovery, the defendant is entitled to have the question of the contributory negligence of the plaintiff clearly and fully submitted to the jury, and not by mere implication, nor by an instruction on the burden of proof, which refers only in the most general way to the care required on the part of the plaintiff. *Virginian R. Co.* v. *Bell*, 429.
3. *Contributory Negligence—What Constitutes—Effect.*—It is not necessary to the defense of contributory negligence to show that it caused the injury complained of. It is enough to show that it proximately contributed to it. If it appears that the negligence of the plaintiff has contributed as an efficient cause to the injury of which he complains, he cannot recover. The court will not undertake to balance

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the negligence of the respective parties for the purpose of determining which was most at fault, nor recognize any gradation of fault in such cases, but will leave the parties where it finds them. *Powhatan Lime Co.* v. *Affleck*, 643.

4. *Lawful Business—Assumption of Risk.*—No cause of action can arise when an injury results from doing a dangerous but lawful act in a lawful manner. In all such cases the doctrine of "assumption of risk" applies. *Steele* v. *Colonial Coal Co.*, 385.

5. *Prevision—Licensees—Trespassers.*—The owner of premises does not owe to either trespassers or licensees the duty of prevision, or of keeping his premises in a safe condition. While he must not intentionally or wilfully injure them, the active duty of protection to licensees only arises after such owner knows of their danger, or might have known of it and avoided it by the use of ordinary care. *Lunsford* v. *Colonial Coal Co.*, 346.

6. *Question for Jury.*—The absence of a hook with which to fasten back a car door being the ground of the negligence charged against a defendant, the question of whether or not the plaintiff, in the circumstances surrounding him, would have made use of the hook, if one had been provided, should be left to the jury, for the absence of the hook could not have been the proximate cause of the plaintiff's injury if he would not have used it had it been in place. *Virginian R. Co.* v. *Bell*, 429.

7. *Safe Premises—Servant Returning From Work—Invitee—Railroads.*—An engineer of a railroad company, while returning from his completed task over the property of the company along a route that he and other employees had pursued with the knowledge of the company for fifteen years, is neither a trespasser nor a licensee, but an invitee, and entitled to protection as such from the dangers of an unguarded ditch dug across such route of which he has no knowledge. *Nesbit* v. *Webb*, 362.

8. *Unsafe Premises—Excavations.*—If a person knows that people are using, and for years have been using, property as a right of way, then it is his duty in making excavations across such pathway, or putting obstructions thereon, to exercise reasonable care and not negligently injure persons so in the habit of using such pathway. *Nesbit* v. *Webb*, 362.

See CARRIERS, 7; DEMURRER TO EVIDENCE, 6; EVIDENCE, 7, 18; INSTRUCTIONS, 5; MASTER AND SERVANT, 3, 4, 7, 9, 10, 11, 13, 14, 15, 16, 17; MINES AND MINERALS, 2, 3; PLEADING, 4. 5. 9; RAILROADS, 1, 2, 3, 4, 8.

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NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES; FRAUDS (STATUTE OF), 2.

NEW TRIAL.

1. *More than Two to Same Party.*—As there is much diversity of opinion in other jurisdictions as to the proper interpretation of the statute declaring that not more than two new trials shall be granted to the same party in the same cause, this court will not undertake to construe it until a case arises in which it is necessary. *Spriggs* v. *Jamerson*, 250.

See APPEAL AND ERROR, 22.

NON-SUIT. See DISMISSAL AND NON-SUIT.

NOTICE.

1. *Actual—Constructive.*—Actual notice and constructive notice, in any of its varieties, produce exactly the same effects upon the equitable rights and liabilities of the party charged thereby. *Liquid Carbonic Co.* v. *Whitehead*, 586.

See CARRIERS, 5; INSURANCE, 11, 12; SALES, 8; STREET RAILWAYS, 5; TRUSTS AND TRUSTEES, 2, 3.

NUISANCE.

1. *Continuous—Occasional—Pleading.*—Under a declaration alleging a continuous nuisance, the plaintiff may recover for occasional nuisances if the occasional nuisances were caused in the manner alleged in the declaration. *Virginia Ry. & P. Co.* v. *Ferebee*, 289.

See LIMITATION OF ACTIONS, 5.

OFFER AND ACCEPTANCE. See CONTRACTS, 12.

OFFICERS. See MUNICIPAL CORPORATIONS, 1, 2.

OPINIONS. See EVIDENCE, 8, 9; WILLS, 17.

OPTIONS. See CONTRACTS, 12.

ORDINANCES. See EVIDENCE, 26.

OWNER. See ACCOUNT, 1.

OYER. See PLEADING, 12.

PARTICULARS. See DEMURRER TO EVIDENCE, 4, 5, 7.

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PARTIES.

1. *Bill to Quiet Title—Necessary Parties—Adverse Claimants—Squatters.*—Claimants of land whose possession originated many years ago (some of them over three-quarters of a century), some of whom assert legal titles, and others equitable titles, to portions of the land by processes recognized by law, and who are legally and beneficially interested both in the subject-matter and the event and object of a suit to remove their claims as clouds upon complainants' title, are not mere squatters, but *bona fide* adverse settlers and are *necessary* parties to such suit. *Buchanan Co.* v. *Smith*, 704.
2. *Necessary Parties—Parties by Representation.*—Necessary parties include all persons, natural or artificial, however numerous, materially interested, either legally or beneficially, in the subject-matter or event of the suit, and who must be made parties to it, and without whose presence in court no proper decree can be rendered. This rule is inflexible except where it is practically impossible to comply with it, and the absent parties are represented by others who have the same interest and are equally certain to bring forward the entire merits of the controversy as would the absent persons. *Buchanan Co.* v. *Smith*, 704.
3. *Representation.*—The doctrine of representation applies only to contingent interests, and, further, in order to represent parties not before the court, the party before the court must be one of a class whose interests are identical with the parties to be represented. *Goodloe* v. *Woods*, 540.

See CONTEMPT, 2; DOWER, 1; WILLS, 16.

PASSENGERS. See CARRIERS, 1, 6, 7, 9.

PAYMENT. See TAXATION, 12.

PEDIGREE. See EVIDENCE, 16.

PERSONAL PROPERTY. See WILLS, 2.

PLEADING.

1. *Action Against Guarantor—Plaintiff's Title.*—In an action against the guarantor of a note, an averment in the declaration that the note was payable to the defendant, and that "the defendant for a valuable consideration, in writing, undertook, promised and guaranteed the payment" (of the note) "to the plaintiff," necessarily implies that the plaintiff had become and was the owner or legal holder of the

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note, the payment of which to the plaintiff the defendant had guaranteed, though it would have been better pleading to have averred in terms how the plaintiff became the owner or holder of the note. *Bowman* v. *First National Bank*, 463.

2. *Amended Declaration—Departure.*—Where an amended declaration asserts rights or claims arising out of the same transaction, act, agreement or obligation as that upon which the original declaration is founded, it will not be regarded as for a new cause of action, however great may be the difference in the form of liability asserted in the original and the amended declarations. The two declarations are regarded as alleging variations in the form of liability to meet the varying phases of the evidence as it may appear. *Bowman* v. *First National Bank*, 463.
3. *Amendments—Departure—Endorser and Guarantor.*—A plaintiff may, by different counts in his declaration, declare on the same notes against the defendant both as endorser and as guarantor, hence there is no departure where the original declaration declares against him as endorser, and the amended declaration declares against him as guarantor. *Bowman* v. *First National Bank*, 463.
4. *Declaration—Allegation of Negligence—Disobedience of Rules.*—A count of a declaration which sets out in detail how the defendant had modified or partially abrogated one of its rules, and then substantially alleges that the injury complained of was occasioned by the negligent failure of the defendant to observe the rule as modified, states a good cause of action. *Ches. & O. R. Co.* v. *Swartz*, 723.
5. *Declaration—Assumption of Risk—Contributory Negligence.*—Assumption of risk and contributory negligence are matters of defense, and the fact that the plaintiff has not assumed the one or been guilty of the other need not be averred in the declaration. If, however, the declaration shows that the plaintiff has assumed the risk or been guilty of contributory negligence, it will be held bad on demurrer. *Ches. & O. R. Co.* v. *Swartz*, 723.
6. *Declaration—Bill of Particulars.*—Where a declaration states a good cause of action and the defendant desires a more particular statement of the grounds of complaint, he should demand a bill of particulars under section 3249 of the Code. *Ches. & O. R. Co.* v. *Swartz*, 723.
7. *Insufficient Plea—Objection—Forced to Join Issue—Effect.*—If a plea is insufficient and no answer to the action, it should be rejected when objected to, and the plaintiff should not be put to an issue upon it. A mental reservation of the

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court to strike it out during the trial, not acted upon, does not cure the error, and the failure to strike it out constitutes good ground for reversal unless, when all the facts are certified, it affirmatively appears that the plaintiff could not have been injured by having been forced to try his case on the improper plea. *Hawkins* v. *Chapin*, 792.

8. *Joinder of Actions.*—The general rule is that demands against the same party may be joined when they are all of the same nature and the same judgment has to be given in each, although the pleas may be different. *Bowman* v. *First National Bank*, 463.

9. *Negligences—Contributory Negligence—When a Question of Law.*—Whether or not a declaration discloses such contributory negligence on the part of the plaintiff as will bar a recovery by him is, on a demurrer to the declaration, a question of law for the court. The demurrer admits the facts alleged to be true, and when the facts are undisputed and decisive of the case, a question of law is raised and the court should decide it. *Recker* v. *Southern R. Co.*, 201.

10. *Special Plea of Recoupment—General Issue.*—A plea which alleges that the plaintiff not only failed to keep and perform his agreement in various particulars, but that by reason of such failure the defendant was injured and damaged in excess of the amount claimed and sued for by the plaintiff sets up a good defense, and does not amount simply to the general issue. *Luck Const. Co.* v. *Russell Co.*, 335.

11. *Variance—Amendments—Continuance—Code, Section 3384.*—Where there is a variance between the allegations of the pleadings and the evidence, it is in conformity with section 3384 of the Code to allow the pleadings to be amended and, if need be, continue the case, and the practice is to be commended as promotive of substantial justice. *Ches. & O. R. Co.* v. *Swartz*, 723.

12. *Variance Between Writ and Declaration—Oyer.*—If an amendment of a declaration at the bar creates a variance between the declaration and the writ the defendant should crave oyer of the writ and move to quash it because of the variance. The writ, in such case, is no part of the record, and the variance could only be disclosed by making it a part of the record by oyer. *Ches. & O. R. Co.* v. *Chapman*, 32.

See ASSIGNMENTS, 1; CRIMINAL LAW, 14; EVIDENCE, 7; MOTION FOR JUDGMENT, 1, 2; NEGLIGENCE, 3; NUISANCE, 1; RAILROADS, 6.

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POLICE POWER. See CONSTITUTIONAL LAW, 1, 2, 3.

POSSESSION. See DEEDS, 9.

POWERS. See WILLS, 12.

PRECAUTIONS. See EVIDENCE, 18.

PRESUMPTION. See CONSTITUTIONAL LAW, 7; CRIMINAL LAW, 10; PRINCIPAL AND AGENT, 1; SANITY, 1, 2; TENANTS IN COMMON, 3, 4; WILLS, 8.

PRINCIPAL AND AGENT.

1. *Continuance—Presumption.*—An agency once established will be presumed to continue, in the absence of evidence to the contrary. *White* v. *Am. Nat. Life Ins. Co.*, 305.
2. *Transmitting Proposal to Principal—Agent for Both Parties.*—An agent to sell land may, with propriety, transmit to his principal for his acceptance or rejection the offer of a proposed purchaser. This is not acting as agent for both parties in the purchase and sale of the land. *Croghan* v. *Worthington Hardware Co.*, 497.
3. *Unauthorized Act of Agent—Ratification—Slight Evidence.*—An act of an agent from which he derives no personal benefit, but which is done in good faith for the benefit of his principal, and which was apparently necessary and would redound to his benefit, will be held to have been ratified and acquiesced in, and be thereby rendered valid upon slight evidence. If a principal knows that an agent has transcended his authority, he must promptly disavow the act, or he makes it his own. This doctrine of the ratification of the acts of agents is as applicable to corporations as to other principals. *Winston* v. *Gordon*, 899.

See CARRIERS, 5; INSURANCE, 10.

PRINCIPAL AND SURETY.

1. *Contracts—Building Contract—Performance—Damages—Case in Judgment—Principal and Surety.*—A contractor gave bond with surety to build and complete a building according to certain plans and specifications. After partially fulfilling his contract, he gave up the job, and the owner let the completion of the building to another contractor for the balance agreed to be paid the first contractor. The second contractor gave the same surety for the performance of his contract that was given by the first contractor.

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The work was completed by the second contractor at a considerable loss, which was made good to him by the surety aforesaid. The surety thereupon sued the first contractor to recover the amount of the loss paid as aforesaid. The first contractor had nothing to do with the making of the contract for the completion of the unfinished building, and, in fact, knew nothing of it.

Held: The first contractor is in no way liable for the loss sustained by the second contractor, which was voluntarily paid by the common surety on the two bonds. *Tatterson* v. *Fidelity Deposit Co.*, 409.

See EVIDENCE, 19; FRAUDS (STATUTE OF), 1.

PRIVILEGED COMMUNICATIONS. See EVIDENCE, 11.

PROCESS.

1. *General Appearance—Motion to Dismiss for Want of Declaration.*—Where the court has jurisdiction of the subject matter of an action, an appearance and motion to dismiss the action for want of a declaration is a general appearance, though designated special, and is a waiver of all defects in the process and the time and manner of its service. The defendant thereby submits himself to the jurisdiction of the court. *Rosenberg* v. *U. S. Fidelity Co.*, 221.
2. *Return—Judicial Notice.*—Process to commence a suit is part of the record for the purpose of amendment, and the court will look to the return thereon, when necessary, not only to show the date of the return, but also the date of the execution of the writ. *House* v. *Universal Crusher Corp.*, 558.
3. *Time of Service—Return—Judicial Notice.*—Where process returnable to November rules, which begin November 4, is returned executed October 23, it sufficiently appears from the return that full ten days elapsed between the service of the process and the return day thereof. The time for the commencement of the terms of the several courts is fixed by general law, of which the court takes judicial notice. *House* v. *Universal Crusher Corp.*, 558.

PROHIBITION.

1. *When Writ Lies.*—The writ of prohibition does not lie to correct error, but to prevent the exercise of the jurisdiction of the court by the judge to whom it is directed, either where he has no jurisdiction at all or is exceeding his jurisdiction. If the court or judge has jurisdiction to enter any order in the proceeding sought to be prohibited, the writ does not lie. *Grief* v. *Kegley*, 552.

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PROMOTERS. See CORPORATIONS, 7.

PROTEST. See TAXATION, 12.

PUBLIC OFFICERS. See COSTS, 3.

PUBLIC SERVICE CORPORATIONS. See STREET RAILWAYS, 1.

PUNITIVE DAMAGES. See MASTER AND SERVANT, 18.

PURCHASER. See SALES, 8; VENDOR AND PURCHASER.

QUIETING TITLE. See EQUITY, 8; PARTIES, 1.

RAILROADS.

1. *Grade Crossing—Negligence of Traveller—Last Clear Chance.*—While it is the duty of a railroad company to give notice of the approach of its train to a crossing, the reciprocal duty is imposed upon a person about to go on its track to exercise ordinary care and caution, whether it be a highway crossing or a licensed way, and if he fails to look and listen, and attempts to cross the track in front of a moving train and is injured by it, his own negligence so contributes to his injury as to bar recovery, unless the railroad company, after it discovered or ought to have discovered his peril, might have avoided the injury by the exercise of ordinary care. *Boyd* v. *Southern R. Co.*, 11.
2. *Grade Crossing—Negligence of Traveller—Last Clear Chance.*—Where a traveller is struck by a railroad engine at a grade crossing as soon as he steps upon the track, it cannot be said that the railroad company had the last clear chance of avoiding the injury. He was not in peril until he started to cross the track, and it was then too late for the engineer to have stopped his train or avoided the injury if he had been on the lookout and had seen the plaintiff's danger. *Boyd* v. *Southern R. Co.*, 11.
3. *Grade Crossing—Spur Tracks—Rights of Owner or Employee on Premises.*—The fact that an employee of a manufacturing company is on the private property of the company, going to his place of business, does not excuse him from looking and listening before going upon a spur track of a railroad rightfully operated through the company's grounds. His rights at such crossing are no higher (if as high) than if it had been a public highway crossing. *Boyd* v. *Southern R. Co.*, 11.

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4. *Personal Injury—Negligence—Acts of Agent.*—The acts of the engineer and fireman of an engine, done in the presence and by the direction or at the request of a hostler who has taken charge of the engine on a railroad yard, and who knows that the train is protected by blue lights, are as much the acts of the hostler as if done by him personally. *Ches. & O. R. Co.* v. *Swartz*, 723.

5. *Promulgation of Rules—Licensee—Case at Bar.*—The rule requiring the promulgation of rules for the movement of engines and trains on a railroad yard has no application to a mere licensee on such yard. The railroad company owes him no such duty, but even if it did, the evidence in the case at bar does not show any proximate causal connection between the alleged omission and the injury complained of. *Steele* v. *Colonial Coal Co.*, 385.

6. *Railroads—Rules—Construction—Modification.*—The allegation that a rule of a railroad company had been modified and partially abrogated by the company in certain designated particulars is not altered by the fact that the pleader has elsewhere spoken of the change as the construction of the rule habitually practiced and acquiesced in with the knowledge of the company. *Ches. & O. R. Co.* v. *Swartz*, 723.

7. *Riding on Freight Trains—Jerking—Licensee.*—When one takes passage on a freight train, he assumes the risk of such jerking and jarring as are incident to the operation of that class of trains as distinguished from passenger trains. The same rule applies necessarily to one who is riding on such a train as a mere licensee. *Steele* v. *Colonial Coal Co.*, 385.

8. *Spur Tracks—Crossings—Travellers—Look and Listen—Negligence.*—A person familiar with the tracks and sidings of a railroad who is injured by being struck by a shifting engine on a spur track is not relieved of the imputation of negligence in failing to look and listen before going upon the track by the fact that he had shortly before that met the engine going in upon the spur track to which there was no other outlet. He must have known that the engine would return as soon as it accomplished its work, for in no other way could it have finished its shifting or returned to the main line. *Boyd* v. *Southern R. Co.*, 11.

See CARRIERS, 1, 3, 6, 8, 9; DEMURRER TO EVIDENCE, 3; EVIDENCE, 20, 21, 23, 24; INVITEES, 1; MASTER AND SERVANT, 2, 4, 5, 6, 9, 16; NEGLIGENCE, 7; PLEADING, 4.

RAPARIAN OWNERS. See NAVIGABLE WATERS, 2.

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RATES. See STREET RAILWAYS, 3, 4, 9.

RATIFICATION. See CORPORATIONS, 2; MASTER AND SERVANT, 19; PRINCIPAL AND AGENT, 3.

REAL ESTATE AGENTS. See BROKERS.

RECEIVERS. See CONTEMPT, 2; CORPORATIONS, 3, 4.

RECORD. See UNITED STATES, 1.

RECOUPMENT. See PLEADING, 10.

REFORMATION. See EQUITY, 5.

RELEASE. See CORPORATIONS, 6, 7.

REMAINDER. See LIFE ESTATES, 1; WILLS, 1.

RENT. See LANDLORD AND TENANT, 2, 5, 6; VENDOR AND PURCHASER, 3.

REPAIRS. See EVIDENCE, 18.

REPORTS. See EVIDENCE, 21.

REPRESENTATION. See PARTIES, 3.

RESCISSION.

1. *False Representations—Material Facts—Truth.*—The false representation of a material fact, constituting an inducement to a contract for the purchase of real estate, on which the purchaser had the right to rely and upon which he did rely, is always ground for a rescission of the contract by a court of equity. The intent of the party making the representation, and his belief in its truth, are alike wholly immaterial. It is sufficient that the statement was material, was relied on by the purchaser, and was in fact untrue. *Rafferty* v. *Heath*, 195.

2. *False Representations of Price Paid and Rents Received.*—False representations by a vendor of the price paid by him for the property, and of the amount of rents being actually received by him for it, when relied upon by the vendee, are sufficient to warrant a rescission of the contract of sale by a court of equity upon application therefor by the vendee. *Rafferty* v. *Heath*, 195.

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3. *Placing Parties in Statu Quo.*—In a suit to rescind a contract of sale of real estate, if a court of equity finds that a condition exists which renders it impossible to restore the parties substantially to their original positions, and that to rescind the contract would result in an injustice, the rescission will be refused. *Rafferty* v. *Heath*, 195.

4. *Res Judicata.*—The present controversy between the United States and the general creditors of the Wm. R. Trigg Co., with respect to the vessels "Mohawk" and "Galveston," is not *res judicata* by reason of prior decisions of this court or of the Supreme Court of the United States. *United States* v. *W. R. Trigg Co.*, 272.

5. *Rights of Third Persons—Defendants' Objections.*—A defendant cannot defeat a rescission of a contract of sale of real estate procured by his fraudulent misrepresentations upon the plea that he has received and is in the enjoyment of the fruits of his fraudulent practices which he is unable or unwilling to restore. The court will protect the rights of innocent third persons which have intervened, and if this imposes an additional burden on the plaintiff, the defendant cannot complain of it. *Rafferty* v. *Heath*, 195.

See DEEDS, 10; SALES, 2; VENDOR AND PURCHASER, 3, 4.

RES JUDICATA. See APPEAL AND ERROR, 20; JUDGMENTS, 2.

REVERSION. See WILLS, 12.

ROADS. See HIGHWAYS, 1.

RULES. See EVIDENCE, 20; RAILROADS, 5, 6.

RULE DAYS.

1. *Failure to File Declaration—Dismissal.*—The power of the clerk to dismiss an action at rules for failure to file a declaration, under section 3241 of the Code, only arises when the process is returned executed as to one or more of the defendants. *House* v. *Universal Crusher Corp.*, 558.

2. *Failure to File Declaration—Dismissal—Case at Bar.*—Where process to commence a suit is returned executed at first November rules (being November 4), the clerk has no power to dismiss the suit for want of a declaration at the first December rules following, where, under the provisions of section 3236, the latter rules fall on November 25, as one month has not elapsed since the process was returned executed. *House* v. *Universal Crusher Corp.*, 558.

See PROCESS, 3.

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SAFE APPLIANCES. See MASTER AND SERVANT, 2, 5.

SAFE PLACE. See MASTER AND SERVANT, 1, 3, 7, 14, 15, 16, 17, 20.

SALES.

1. *Affirmation of Quality—Sales.*—Although there is no warranty of the germinating properties of seed offered for sale, yet if the affirmation is made that they are of the crop of the previous year for the purpose of influencing the buyer, as an affirmation of quality, and the affirmation is relied on by the buyer, and the evidence shows that seed of good quality of that year's crop are good, merchantable seed, then the fact that the seed had practically no germinating qualities strongly tends to prove that they were not of the crop of the previous year, and that there was a breach of the affirmation or warranty that they were of that year's growth, and the verdict of the jury so finding should not be set aside as contrary to the evidence. *Jacot* v. *Grossman Seed Co.*, 96.
2. *Breach of Warranty—Rescission—Damages.*—Where there has been a breach of warranty of personal property sold, the purchaser may either rescind the contract, if, within a reasonable time, he notifies the seller of his intention so to do and offers to restore the property, in which event the contract is terminated and the parties are restored to their former rights, or he may retain the property and claim as damages against the seller the difference between the value of the property as warranted and its actual value at the time of the sale. *Jacobs* v. *Warthen*, 571.
3. *Caveat Emptor—Fraud.*—In all sales of personal property the doctrine of *caveat emptor* applies, except when there has been a warranty or deception or some fraud, or a deception upon the part of the seller, misleading the buyer to his injury, and upon which the buyer relied. *Jacobs* v. *Warthen*, 571.
4. *Offer and Acceptance—When Title Passes.*—If an offer to sell personal property at a stated price is accepted, and nothing remains to be done to complete the contract, title passes as soon as the offer is accepted. *Jacobs* v. *Warthen*, 571.
5. *Proof of Sale.*—In an action to recover the purchase price of personal property sold, the burden is on the plaintiff to prove the sale, but if the defendant denies the sale he has the burden of showing that the property came into his possession in some way other than by bargain and sale. *Jacobs* v. *Warthen*, 571.
6. *Representations of Soundness.—As of What Time Applied.*—Representations of the soundness of personal property sold

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are to be applied as of the time the sale is consummated and the title passes, and not of any subsequent time. *Jacobs* v. *Warthen*, 571.

7. *Reservation of Title or Lien—Enforcement Under Section 2462 of Code—Personal Judgment—When to Be Rendered.*—Section 2462 of the Code, as amended by the act of 1904, in relation to the reservation of title or liens on personal property and the method of enforcing the same, is a remedial statute and should be liberally construed so as to give effect to the legislative intent. The purpose of the amendment was to furnish a remedy co-extensive with any case that might fall within its purview or influence. Under the provision authorizing the court to hear and determine all questions arising out of or under the contract, which are properly raised by the pleadings, and to "render such judgment thereon as may be required by the rules of law or equity applicable to such questions," the court has the power and it is its duty to render personal judgments against parties before it who, by reason of their wrongful dealings with the property, have put it beyond the reach of the seller, and have rendered themselves personally liable for the value of the property or the amount of the lien thereon. *Liquid Carbonic Co.* v. *Whitehead*, 586.

8. *Rights of Third Persons—Notice to Seller—Personal Liability.*—A purchaser who has notice of the rights of another and sells to a third person without giving notice to him, so as to place the subject of controversy beyond the reach of the right owner, becomes personally responsible for the demand. *Liquid Carbonic Co.* v. *Whitehead*, 586.

9. *Sale by Sample—Acceptance of Inferior Goods—Warranty—Waiver.*—Upon an executory sale of goods by sample, with a warranty that the goods shall correspond with the sample, the acceptance of an inferior grade of goods after an opportunity for examination does not, as a matter of law, constitute a waiver of the inferior quality of the goods and a satisfaction of the seller's obligations, but the retention and use of the goods for a considerable length of time, without complaint, warrants a strong inference that the goods are either what the contract calls for, or that the buyer is satisfied to accept them instead of such goods, and for this reason it is important to give prompt notice of any defect which exists. *Jacot* v. *Grossman Seed Co.*, 90.

See CONTRACTS, 10; DAMAGES, 2; FRAUD AND FRAUDULENT CONVEYANCES, 1.

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SANITY.

1. *Insane Relatives—Presumption.*—Where no word or act on the part of a person whose sanity is questioned is shown, the fact that he has had insane relatives, standing alone, raises no presumption of insanity. *South Atlantic Ins. Co.* v. *Hurt*, 398.
2. *Presumption.*—Every man is presumed to be sane until the contrary is shown, and the burden is upon the party alleging insanity to prove it. *South Atlantic Ins. Co.* v. *Hurt*, 398.

SEAM. See MINES AND MINERALS, 1.

SET-OFFS. See INSURANCE, 4; PLEADING, 10; VENDOR AND PURCHASER, 3.

SPECIFIC PERFORMANCE.

1. *Contingent Right of Dower—Refusal to Convey—Objection on Other Grounds.*—In the absence of any allegation of fraud, a court of equity will not, at the instance of the vendee, decree the specific performance of a husband's contract to sell his land, in which his wife has a contingent right of dower, which she refuses to release, where the purchaser demands an abatement of the purchase price or an indemnity by reason of such refusal; and, where specific performance is resisted on other grounds, it is immaterial that this objection is not made in the answer. The same weight will be given to it as if it had been distinctly and formally presented. The wife is not to be wrought upon by her love for her husband and sympathy in his situation to do that which her judgment disapproves as contrary to her interest, nor is he to be tempted to use undue means to procure her consent. *Haden* v. *Falls*, 779.
2. *Reconveyance—Case in Judgment.*—One brother conveyed to another a lot of land containing fourteen acres for the consideration of $1,500. The deed provided, however, that the grantor should within five years from the date of the deed go to the grantee and ascertain from him if he was satisfied with the transaction, and, if he was, the sale should stand confirmed; but, if he was not satisfied, the grantor was to pay the grantee $1,600, and the latter was to reconvey the land to the grantor; but, if the grantor could not raise the $1,600, he was to convey to the grantee another parcel of land containing sixteen acres, and that was to close the transaction. A week before the five years expired the grantor went to the grantee and asked him if he was satisfied with the transaction, and the grantee re-

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plied that he was not, and that the grantor could get his money ready. The grantor then, at some trouble and expense, raised the $1,600 and tendered it to the grantee, but he declined to receive it, saying he had changed his mind on the subject and would retain the land. This suit was brought to compel a reconveyance of the land.

Held: The grantee had no right under the facts stated to change his mind and refuse to reconvey the land to the grantor, and the reconveyance will be compelled by a court of equity. *Burner* v. *Burner*, 484.

See DAMAGES, 6; IMPROVEMENTS, 1; INJUNCTIONS, 3; VENDOR AND PURCHASER, 2.

SPEED. See EVIDENCE, 23, 24; MASTER AND SERVANT, 4.

SQUATTERS. See PARTIES, 1.

STARE DECISIS. See JUDGMENTS, 3.

STATE CHEMIST. See CRIMINAL LAW, 6.

STATE CORPORATION COMMISSION. See STREET RAILWAYS, 1, 3, 9.

STATE HOSPITALS. See INSANE PERSONS, 1.

STATUTES.

1. *Constitutionality.*—The constitutionality of a statute will not be determined in any case unless it is absolutely necessary. *Gayle's Case*, 958.
2. *Construction—Motives of Legislature—When Unimportant.*—The motives, purposes and intentions of the legislature have no existence in law where its enactment is plain and unambiguous on its face, except as those motives may be disclosed on the face of the act itself. It is only where the true meaning of the language used in a statute is doubtful, or so obscure that the meaning of the legislature cannot be determined by giving the words used their ordinary and natural signification that resort can be had to the journals, or other extraneous sources of information, for aid in arriving at the true meaning of the language used in the statute. *Shenandoah Lime Co.* v. *Governor*, 865.
3. *Construction—New Remedy—Cumulative Remedy.*—A statute prescribing a new remedy for an existing right should never be construed to abolish a pre-existing remedy, in the absence of express words or necessary implications. *Levy* v. *Davis*, 814.

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4. *Construction—Statutes in Pari Materia.*—Where there is more than one statute bearing on the same subject, all the statutes in *pari materia* must be considered and harmonized if that can be done by any fair and reasonable construction. *Lambert* v. *Barrett*, 136.

5. *Repeals by Implication.*—The repeal of a statute by implication is not favored by the courts. The presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, the two statutes must be irreconcilable. If, by a fair and reasonable construction, they can be reconciled, both must stand. *Lambert* v. *Barrett*, 136.

See CONSTITUTIONAL LAW, 7; CRIMINAL LAW, 1; TAXATION, 5;

STOCKHOLDERS. See CORPORATIONS, 1.

STREET. See MUNICIPAL CORPORATIONS, 3.

STREET RAILWAYS.

1. *Advancing Rates—Rates Fixed by City Ordinance—Code, Section 1294-c (6)—Constitution, Section 156-b.*—Section 1294-c (6) of the Code (1904), providing that "no advance shall be made in the rates, fares and charges of public service corporations until the same have been submitted to and approved by the State Corporation Commission," must be read in connection with section 156-b of the Constitution, which gives to cities, towns and counties the right to prescribe rules, regulations and rates of charge to be observed by public service corporations in connection with any services performed by them under a municipal or county franchise granted by such city, town or county so far as such services may be wholly within the limits of the city, town or county granting the franchise. So, reading the two, the statute must be construed to apply to rates which are not lawfully and definitely fixed by contract and which need the approval of the State Corporation Commission, whereas the rates and transfer privileges involved in the case at bar are fixed by municipal ordinance, embodying a definite contract. *Commonwealth* v. *Richmond & R. Co.*, 756.

2. *Charter Powers—Strict Construction.*—The charter of a street railway company has the elements of a contract and is to be strictly construed against the company. The company has no doubtful rights under its charter, for when there are doubts they are construed against the company and in favor of the city. *Norfolk & P. Co.* v. *Norfolk*, 169.

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3. *Connecting Lines—Lines in and Out of City Limits—Rates—Transfers—Jurisdiction of State Corporation Commission.*—While the State Corporation Commission has full and complete jurisdiction to prescribe rules, regulations and rates for an electric railway lying wholly outside of the city of Richmond and connecting at the corporate limits with a street railway lying wholly within said city, it would be unjust and inequitable to compel the former to accept transfers from the latter when the city councils have relieved the latter of the obligation to accept transfers from the former and it declines to give such transfers. *Commonwealth* v. *Richmond & R. Co.*, 756.
4. *Connecting Lines—Transfers—Motives in Refusing.*—The interests and motives of two street railway companies having connecting lines in discontinuing transfers from one line to the other cannot affect the legal rights of patrons of the lines. The sole question is whether the companies are within their legal rights in discontinuing such transfers. *Commonwealth* v. *Richmond & R. Co.*, 756.
5. *Discontinuance of Transfers—Advertising Under Section 1033-f of Code.*—Section 1033-f of the Code (1904), which provides that before granting any franchise, privilege, lease or right of any kind to use any public property or easement, except a trunk railway, it shall be the duty of the city or town proposing to make the grant to advertise the ordinance, etc., in a newspaper published in such town or city for four successive weeks, has no application to a city ordinance which simply repeals a prior ordinance, requiring two street railway companies to give transfers over each other's lines. *Commonwealth* v. *Richmond & R. Co.*, 756.
6. *Paving Streets—Character of Paving.*—The obligation of a street railway company to keep its portion of the streets "well paved and in good repair" necessarily involves the duty to keep pace with the growth and progress of the city, and to conform its work to the policy of the city in the matter of street improvement. The railway company must put its portion of the street in the same condition as the rest of the street, even though that necessitates the laying of a new pavement. *Norfolk & P. Co.* v. *Norfolk*, 169.
7. *Paving Streets—Proportion of Expense.*—Where a street railway company is bound by law to keep the space between its rails and for two feet beyond them well paved, which part of the paving is more costly than the rest of the street, the extra and separable expense of such part of the paving should be assessed exclusively to the company; and such company is not entitled to be relieved from a tax for pav-

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ing the street by paving the proportion thereof which the width which it is obliged to pave bears to the width of the whole street. *Norfolk & P. Co.* v. *Norfolk*, 169.

8. *Transfers Compelled by City Ordinance—Change of Ordinance.*—Where the privilege of transfer from one street railway to another without additional charge has been lawfully created by a valid city ordinance, and a subsequent ordinance relieves the railway companies of the obligation to furnish such transfers, the privilege ceases. *Commonwealth* v. *Richmond & R. Co.*, 756.

9. *Wholly in City Limits—Rates Fixed by City Councils.*—The councils of the city of Richmond are vested by the Constitution with legislative discretion when prescribing rules, regulations and rates to be observed by street railway companies in connection with services performed under the franchise to use the streets of the city granted by the councils, so far as such services are wholly within the limits of the city, and the State Corporation Commission has no jurisdiction or power to supervise or annul their action in that respect. *Commonwealth* v. *Richmond & R. Co.*, 756.

See MUNICIPAL CORPORATIONS, 3.

SUICIDE. See INSURANCE, 15, 16.

SUPERVISORS. See COUNTIES, 4.

SURPLUSAGE. See CRIMINAL LAW, 18.

TAXATION.

1. *Assessments—Irregularities.*—Technical objections to the time and method of assessing property for taxation are unavailing to prevent a proper assessment. A person whose property is liable to assessment for taxes will not be permitted to evade the payment of his proportion of the public burden by any errors, omissions or irregularities that do not prejudice his rights. *Bridgewater Man. Co.* v. *Funkhouser*, 476.

2. *"Capital"—Corporations—Uniform Taxation.*—The word "capital" as defined in sub-section 4, above mentioned, applies as well to corporations as to individuals conducting the same business. Any discrimination between private persons and corporations in this respect would violate the constitutional provision that "all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects." *Bridgewater Man. Co.* v. *Funkhouser*, 476.

3. *Capital of a Miller.*—Capital employed in the business of a miller is taxable under schedule C, section 8, of the tax bill of this State. *Bridgewater Man. Co.* v. *Funkhouser*, 476.

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4. *"Capital"—What Constitutes—Borrowed Money as Capital*—The tax laws of this State impose a tax on "moneys and credits actively used and employed in carrying on the trade or business." If so actively used and employed, it can make no difference whether capital or part of it was borrowed or not. It is none the less capital of the user, and employed for his profit and at his risk. While the legislature might have authorized the deduction of borrowed money from the amount of capital to be returned for taxation, it has not done so, and such money is to be included in the capital returned for taxation. The capital stock of a company must be clearly distinguished from the amount of capital invested in its business. *Bridgewater Man. Co.* v. *Funkhouser*, 476.
5. *Construction—Use of Same Word—Tax Bill—"Capital."*—It is a rule of construction that when the same word is used in different parts of the same statute the presumption is that it was used in the same sense throughout the statute, unless a contrary intention clearly appears. Applying this rule to the tax bill of this State, the word "capital" as defined in subsection 4 of section 8 was intended to apply also to "capital" as used in the preceding subsections 2 and 3. *Bridgewater Man. Co.* v. *Funkhouser*, 476.
6. *Corporations—Capital Stock.*—Whatever obscurity or confusion may exist elsewhere as to the meaning of the term "capital stock," its meaning is put beyond controversy in the case at bar, for it is expressly charged in the declaration that the whole of the capital stock of the company was invested in and represented by the property and works necessary for the supply of water, and a tax upon the capital stock, in the sense in which it is used in the declaration, was undoubtedly a tax upon the property in which it was invested. *Phillips* v. *Portsmouth*, 180.
7. *Doing Business Without License—Dispute as to Amount.*—A conviction of a merchant for doing business without a license will not be set aside when no license was in fact taken out because of a difference of opinion between the merchant and the commissioner of the revenue as to the proper basis for estimating the amount payable for the license. However that question may be settled, it still remains that he was doing business without the license required by law. *Armour & Co.* v. *Commonwealth*, 312.
8. *Exempting Property—Water Rents—Increased Rate—Municipal Corporations.*—An agreement by a city to pay to a water company a stipulated sum for water rent, and that if at any time a city tax for any purpose be imposed upon any of the property or works of the company necessary for

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the supply of water, the rental stipulated for shall be increased to an amount equal to said tax, is not an agreement to exempt said works and property of the water company from taxation, but is an arrangement for ascertaining the amount of water rent to be paid by the city, and is such a contract as the city may lawfully enter into. *Phillips* v. *Portsmouth*, 180.

9. *Exemptions—Former State Policy Not Changed.*—The constitutional convention, in taking away from the legislature the power of exempting property from taxation, did not intend to change the old policy of the State on the subject of exempting property used wholly for certain charitable purposes, but placed limitations on the use of property exempted, so as to prevent the perversion or abuse of the liberality of the State. *Commonwealth* v. *Lynchburg Y. M. C. A.*, 745.

10. *Exemptions—Strict Construction—Y. M. C. A. Buildings—State Policy.*—While the general rule is that provisions exempting property of individuals and private corporations from taxation should be strictly construed, and taxation of such property is the rule and exemption from taxation the exception, yet, as the policy of the State has been to exempt such property as that held by Young Men's Christian Association, section 183 of the Constitution, relating to such property, should not be construed with the same strictness as that applicable to provisions making exemptions contrary to the policy of the State, and as to such property exemption is the rule and taxation the exception. *Commonwealth* v. *Lynchburg Y. M. C. A.*, 745.

11. *Mineral Lands — Erroneous Assessment — Correction.*—The manner in which erroneous assessments of mineral lands may be corrected is specially provided for by section 437-a of the Code (1904) and amendments thereof, and is entirely different from that of other lands. The correction of mineral land assessments is placed under the jurisdiction of the State Corporation Commission by said section 437-a and amendments thereof, and is excluded from the operation of sections 567, 568 and 573 of the Code (1904) relating to the assessments of other lands by the express provisions of section 567, and hence the Auditor of Public Accounts has no right to file a petition to rehear an order made correcting an alleged erroneous assessment of mineral lands, and the circuit court has no jurisdiction to enter any order in a proceeding founded on such petition. *Grief* v. *Kegley*, 552.

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12. *Penalty for Delay in Payment—Involuntary Payment.*—The payment of a tax in order to avoid a penalty imposed to accelerate the prompt payment of taxes is not such duress as to render the payment involuntary, and the payment cannot be recovered back. *Phillips* v. *Portsmouth*, 180.

13. *Rooms in Y. M. C. A. Building—Occupation for Hire—Effect on Exemption.*—If the dominant purpose in the use made of rooms in a Y. M. C. A. building is to obtain revenue or profit, although it is to be applied to the general objects of the association, the property is liable to taxation. But if, as in the case at bar, the use made of the rooms has direct reference to the purposes for which the association was incorporated, and tends immediately and directly to promote these purposes, then its use is within the provisions of the constitution exempting the property from taxation, although revenue or profit is derived therefrom as incident to such use. *Commonwealth* v. *Lynchburg Y. M. C. A.*, 745.

14. *Taxes Accrue February First—Who to Pay.*—Taxes accrue and become personal charges against the owners of real estate as of the first day of February of each year, and where the owner dies subsequent to that date the taxes for that year become a preferred charge against his estate. *Kinchcloe* v. *Gibson*, 119.

15. *Tenants—Lodgers—Occupants of Rooms in Y. M. C. A. Building.*—The occupant of a room or rooms in a tenement is a lodger and not a tenant where the owner retains his character as master of the house and at the same time retains the general control over the whole house. Rooms in a Y. M. C. A. building so occupied are not leased within the meaning of section 183 of the Constitution. *Commonwealth* v. *Lynchburg Y. M. C. A.*, 745.

TENANTS. See LANDLORD AND TENANT; TAXATION, 15.

TENANTS IN COMMON.

1. *Deed by One—Effect.*—A deed from a tenant in common carries to the grantee only an undivided interest in the property, no matter by what description the property is conveyed. *Goodloe* v. *Woods*, 540.

2. *Deed by One Tenant in Common—Color of Title.*—If a stranger to the title takes a conveyance of the whole estate in a tract of land from one who is only a tenant in common with others, and enters into the exclusive possession of the land, claiming title to the whole, it is an ouster of the other cotenants, and the grantee so entering and claiming title may

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rely upon his adversary possession, if continued for the statutory period. *Virginia Coal & Iron Co.* v. *Hylton*, 418.

3. *Adverse Possession—Land and Minerals—Deed to Fee—Presumption—Ouster of Co-tenant—Case in Judgment.*—When one enters upon land he is presumed to enter under the title which his deed purports on its face to convey, both as to the boundary or extent of the land and the nature of his title. In the case in judgment, the grantee did not enter as a tenant in common, but under a deed conveying the whole land in fee with covenants of a general warranty. There had been no severance of title of the surface and minerals, and his claim of title to the whole land, including the underlying minerals, from the time of entry under his deed, operated as an ouster of the other tenants in common, and gave him the right to rely upon his adversary possession, which, if continued for the statutory period, bars the other tenants both as to the land and the underlying minerals. *Virginia Coal & Iron Co.* v. *Hylton*, 418.

4. *Possession by One—Presumption—Adverse Possession.*—The entry and possession of one tenant in common is ordinarily deemed the entry and possession of all, and this presumption will prevail in favor of all until some notorious act of ouster or adversary possession is brought home to the knowledge of the others. Yet a tenant in common may enter adversely and claim in severalty, and, where he does, the statute of limitations will run in his favor and against his tenants in common. *Virginia Coal & Iron Co.* v. *Hylton*, 418.

See JOINT TENANTS, 1, 2.

THREATS. See CRIMINAL LAW, 17.

TIME. See CRIMINAL LAW, 18.

TORTS.

1. *Joint Wrong-Doers—Participation.*—Where one party is a participant in and a beneficiary of the wrong of another, which could not have been made effectual without his co-operation, the two are jointly liable to the party injured. *Jordan* v. *Walker*, 109.

TRANSFERS. See STREET RAILWAYS, 3, 4, 8.

TRESPASSER. See INFANTS, 2; NEGLIGENCE, 5, 7,

TRIAL. See APPEAL AND ERROR, 21.

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TRUSTS AND TRUSTEES.

1. *Interest in Trust Subject—Insane Persons—Suit by Committee.*—The right of maintenance, either entire or partial, in a trust fund constitutes such a proprietary right in the fund as entitles the beneficiary to the protection of the courts with respect to it, and where this right is vested in an insane person, his committee is the proper person to sue for its preservation and protection. Code, section 1697. *General Board* v. *Robertson*, 527.
2. *Purchaser—Notice of Trust.*—A purchaser with notice of a trust, either express or implied, becomes himself a trustee for the beneficiary with respect to the property and is bound in the same manner as the original trustee from whom he purchased. *Liquid Carbonic Co.* v. *Whitehead*, 586.
3. *Trustee a Purchaser for Value—Liens—Notice—Burden of Proof.*—The trustee in a deed of trust to secure creditors is a purchaser for value, and if he is to be charged with notice of a prior right to or lien upon the property conveyed to him, the burden of proof to show such notice is on the party alleging it. The fact of notice, however, may be inferred from circumstances as well as shown by direct evidence and must be such as to affect the conscience of the purchaser, and so strong and clear as to fix upon him the imputation of bad faith. In the case at bar the trustee had such notice. *Liquid Carbonic Co.* v. *Whitehead*, 586.

See ASSIGNMENTS, 1; CONSTITUTIONAL LAW, 6; DEEDS, 2; INSANE PERSONS, 1; LIMITATION OF ACTIONS, 1; WILLS, 6. 7.

ULTRA VIRES. See CORPORATIONS, 2; INSURANCE, 6.

UNITED STATES.

1. *Contractural Powers—Exemption From Registry Laws of State.*—The United States, as an incident of its sovereignty, has capacity to contract co-extensive with the duties and powers of government, and this power carries with it complete exemption from all obligation to comply with State registry laws. It is not necessary for it to comply with the registry laws of the State in order to preserve a lien created by contract with it. The lien, without recordation, simply takes its place, and is superior to the claim of all other creditors who have no prior lien. *United State* v. *W. R. Trigg Co.*, 272.

VARIANCE. See APPEAL AND ERROR, 23; PLEADING, 11, 12.

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VENDOR AND PURCHASER.

1. *Contracts of Hazard—Sale of Land in Gross—Presumption.*—Contracts of hazard as to the quantity of land in a designated boundary are not discountenanced when they are clearly established and their terms are fair and reasonable, but courts of equity do not regard them with favor. The presumption is against them, and this presumption can only be overcome, if at all, by clear and cogent proof. Where parties contract for the payment of a gross sum for a tract or parcel of land, the presumption is that the quantity influences the price to be paid, and that the agreement is not one of hazard. *Wardell* v. *Birdsong*, 294.
2. *Defective Title—Rights and Liabilities of Vendee.*—If a vendor is unable to convey good title to a purchaser who has been put in possession of land, the purchaser should be given the privilege of accepting such title as the vendor can make; but, if he refuses to avail himself of the privilege, a court of equity will decree the surrender of the land to the vendor. *Goodloe* v. *Woods*, 540.
3. *Defective Title—Surrender of Possession—Rents—Improvements.*—Where real estate is sold and the vendor cannot give a good title, but puts the vendee in possession, who makes improvements thereon, if an accounting is taken, the rents and profits up to the time of the decree for the surrender of the property should be set off against the improvements. The vendee is chargeable with reasonable rents and profits, and with any waste committed by him. *Goodloe* v. *Woods*, 540.
4. *Rescission—Mutual Mistake—Sale of Land in Gross—Contracts of Hazard.*—Where the mistake in the quantity of land sold is so gross as to amount to a fraud upon the purchaser, he should not be required to abide by his contract, if executory, and, if executed, a court of equity has the power to and should relieve him of the consequences of the mistake by rescinding the contract *in toto*, provided always the parties thereto can be put *in statu quo* and the rights of innocent third persons have not intervened. It is not necessary that there should have been intentional or wilful fraud and deceit. Thus where a vendor honestly believed and represented a tract of land to contain about two hundred acres, when in fact it contained only ninety-four and one-half acres, the sale will be set aside, although the deed contains a clause that "it is understood this land is sold by the lump and not by the acre." *Wardell* v. *Birdsong*, 294.

See SPECIFIC PERFORMANCE, 1, 2; TRUSTS AND TRUSTEES, 2, 3.

VENIRE FACIAS. See CRIMINAL LAW, 19, 20, 21, 22, 23.

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VENUE. See CRIMINAL LAW, 2, 9, 16.

VERDICTS.

1. *Evidence to Support.*—Where the evidence in a cause is conflicting, but there is ample evidence to sustain the finding of the jury, their verdict will not be set aside. *Luck Construction Co.* v. *Russell Co.*, 335.
2. *Evidence to Support.*—Although the facts of a case are controverted, the verdict of the jury will not be set aside, where there is evidence sufficient to sustain the verdict, and the jury have been properly instructed. *Richmond* v. *Burton*, 206.

See APPEAL AND ERROR, 6, 8, 11, 22, 24, 25, 26, 27, 28, 29; DAMAGES, 3, 4; EJECTMENT, 1; FRAUD AND FRAUDULENT CONVEYANCES, 3; INSTRUCTIONS, 4.

VICE-PRINCIPAL. See MASTER AND SERVANT, 1, 20.

WAIVER. See BILLS AND NOTES, 1; CARRIER, 2; CORPORATIONS, 5; DEMURRER TO EVIDENCE, 5; EVIDENCE, 2; FRAUD AND FRAUDULENT CONVEYANCES, 2, 8; INSURANCE, 9.

WARRANTIES.

1. *Breach—Burden of Proof.*—The burden is on the defendant who relies upon a breach of warranty of soundness of personal property, to prove the warranty and its breach by a preponderance of affirmative evidence. *Jacobs* v. *Warthen*, 571.
2. *What Constitutes a Warranty.*—To constitute a warranty no particular form of expression is required. An apparent intention to warrant is sufficient. It is enough if the words used import an engagement on the part of the seller that the article is what he represents it to be. Any distinct affirmation of quality made by the seller, at the time of the sale, or during the negotiations that led up to the sale, not as an expression of opinion or belief, but as an assurance to the purchaser of the truth of the fact affirmed and an inducement to him to make the purchase, is, if accordingly received and relied on and acted upon by the purchaser, an express warranty. *Jacobs* v. *Warthen*, 571.

See SALES, 1, 2, 9.

WATER-RENTS. See TAXATION, 8.

WATERS AND WATER COURSES. See NAVIGABLE WATERS, 1, 2.

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WILLS.

1. *Benefit to Life Tenants—Remaindermen.*—Where a testator has charged his whole estate with the payment of his debts, and provided for a sale thereof for that purpose, and directed the order in which the property is to be sold, and subject to these provisions has given his property to one set of persons for life and to another in remainder, intending that the life tenants shall have the possession and enjoy any incidental benefits arising from the use of the property until a sale is necessary, the remaindermen cannot complain of such benefits derived by the life tenants, but take their estate *cum onere*. *Kincheloe* v. *Gibson*, 119.

2. *Construction—Case in Judgment—Personal Property—Choses in Action.*—A testator of little learning, but of fine sense and large business experience, and familiar with the difference between real and personal property and the different kinds of personal property, made a holograph will. By it he gave to his wife a designated piece of real estate and "three thousand dollars in cash from any money that may be to my credit at the time of my death, and all of my personal property of every description." He gave to his youngest daughter two designated pieces of real estate, and then requested that all other property owned by him, except such as he had given away in the will, be kept together until his youngest child became of age, and then equally divided amongst all of his children. He appointed his wife agent "to take in charge all of my property and collect all rents and make improvements and give to herself and children and unmarried daughter a support out of any rents she may collect until the youngest child becomes of age." His estate consisted of real estate, household and kitchen furniture, a large amount of bonds and notes, many of which were not due at the time of his death, and less than $1,000 in bank.

Held: The surviving wife is entitled to the entire personal estate of the testator, including choses in action, and that the provision for support means support according to their station in life, and if the net rents are more than sufficient for that purpose, the surplus over a support should be preserved for distribution among all the children when the youngest reaches maturity. *Ross* v. *Ross*, 374.

3. *Construction—Intention of Testator—Change of Words.*—Where the testator's intention is manifest from the whole will and surrounding circumstances, but is endangered and obscured by inapt and inaccurate modes of expression, the language used will be subordinated to that intention, and,

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in order to give effect to such intention, one word may be substituted for another, but the right of the court to mould the language of a will by rejecting, supplying, transposing or substituting words exists only where the testator's intention is clear or manifest from the context and the surrounding circumstances. *May* v. *Sherrard*, 617.

4. *Construction—Substitution of Words—Case in Judgment.*—A testatrix, by a codicil in her own handwriting, gave a $600 certificate of stock in a manufacturing company to certain designated legatees, and in the same clause uses the following language: "I have also $1,400 certificate at Clover S. C. Manfc. Co., M. L. Smith, Treas., put there the 11th of April, 1910, and no interest as yet drawn at 7 *per cent.* See that it is drawn by check. That I wish to go to." Both certificates were claimed by the same legatees, who insisted that the final word "to" in the sentence quoted should be construed and treated as intended for the adverb "too," but it is held that this could not be done, and that the $1,400 certificate passed under the residuary clause of the will. *May* v. *Sherrard*, 617.

5. *Construction—Technical Words.*—In construing wills the words used should be given their ordinary and usual signification; but where technical words are used, they are presumed to be used technically, and words of a definite legal signification are to be understood as used in their definite legal sense, unless the contrary appears on the face of the instrument. *Ross* v. *Ross*, 374.

6. *Devise to Church—Legal Beneficiary—Enforcement in Equity.*—While a church cannot take real estate by devise, under the statute law of this State, if property be devised to a church for a specific, definite, legal purpose, such as the erection of a memorial to a deceased relative, the church is not the beneficiary but a bare trustee, holding the property for the object named, and the devise is valid, and if for any reason the church cannot administer the trust through the medium of its agencies, a court of equity will administer it, on the principle that a court of equity will never permit a trust to fail for want of a trustee. *St. Stephen's Church* v. *Morris*, 225.

7. *Devise to Church and Others—Personally for Benefit of Church—Case in Judgment.*—When an estate, consisting of real and personal property, but chiefly personal estate, is devised and bequeathed to a church with directions to apply one-half of the estate to the erection of a designated memorial, and $600 of the residue to the purchase and erection of certain specified tombstones, inasmuch as a church can-

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not take real estate by devise under the laws of this State, a court of equity, in furtherance of the purposes of the testator, will discharge the interest of the church under the will, from that portion of the estate which it can take without objection, and devote the real estate or its proceeds to building the memorial and buying the tombstones, which is not an illegal intent and violates no law. It is not the policy of the law to seek grounds for avoiding devises and bequests, but rather to deal with both so as to uphold and enforce them if it can be done consistently with the rules of the law. *St. Stephen's Church* v. *Morris*, 225.

8. *Erasures—Presumption.*—An erasure of words in holograph will is presumed to have been made by the testator, in the absence of proof to the contrary. *Wilkes* v. *Wilkes*, 886.

9. *Execution—Signature of Testator—Place of Signature—Case in Judgment.*—The will of a testatrix was written on six sheets of paper. When the attesting witnesses were called upon to witness the execution of the will, each one of the sheets of paper upon which the will appears, except the last, had already been signed by the testatrix, who, in the presence of the witnesses affixed her signature to the margin of the last sheet nearly opposite the end of the will and above the concluding clause. The subscribing witnesses then attested the will in the usual form. These witnesses, in their testimony before the jury, establish every formality required by the statute law of this State with respect to the execution of a will.

Held: The will was signed by the testatrix in such manner as to make it manifest that the name was intended as a signature and the will was duly executed. No man publishes an instrument as his last will and testament, and calls on witnesses to attest the fact, until he has completed the act. The attestation must be annexed or subscribed to a complete instrument, to which, when so subscribed, no additions can be made. To the act itself the law attaches testamentary intent, that it is a concluded instrument, and if the party is under no restraint, acts freely, and is of sane mind, no further proof is requisite to sustain the instrument as a will. *Murguiondo* v. *Nowlan*, 160.

10. *Legacies—Specific—Demonstrative.*—A specific legacy is a bequest of a specific article of the testator's estate, distinguished from all others of the same kind; for example, a particular horse, or piece of plate, or money in a certain purse, or chart, a particular stock in public funds, a particular bond or other instrument for the payment of money; whereas a demonstrative legacy is a bequest of a sum

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of money or of quantity or amount having a pecuniary value and measure, not in itself specific, but made *primarily* out of a designated particular fund or piece of property belonging, or assumed to belong, to the testator. *May* v. *Sherrard*, 617.

11. *Object of Construction—Expressed Intention of Testator.*—The object in construing a will is to arrive at the true intention of the testator as gathered from the language used; that is, his expressed intention, disclosed by the meaning of the words used, when properly interpreted, rather than his presumed or supposed intention. *Ross* v. *Ross*, 374.

12. *Reversion—Power of Disposition—Deed or Will.*—Under a devise of land to several parties for their lives and "to be disposed of by them at their deaths as they may think proper," the quoted words are not sufficient to limit the exercise of the power of disposition to a disposition by will. Where a general power of disposition over the reversion is given to the life tenant of real estate, it may be exercised by a deed executed and delivered during his lifetime. *Goodloe* v. *Woods*, 540.

13. *Specific Devises and Bequests—Revocation—Case in Judgment.*—A devise of "my dwelling house and the lot on which it stands" . . . "to be sold and equally divided between" two designated beneficiaries, is either a gift of the house and lot or it is a gift of the fund arising from the sale thereof. If it be a gift of the house and lot, it is manifestly a specific devise; if it is a gift of the fund arising from the sale directed, it is equally specific, and the subsequent alienation of the property by the testatrix worked a revocation if it was a devise, and an ademption if it was a bequest. *May* v. *Sherrard*, 617.

14. *Specific Legacies—Ademption.*—As a general rule a legacy will not be construed as specific unless it appears clearly to have been so intended, and whether or not it is specific depends wholly upon the language of the will. Liability to ademption is said to be the most distinctive feature of a specific legacy. *May* v. *Sherrard*, 617.

15. *Specific Legacy—Ademption—Intention of Testator.*—The fact that a testator states in the codicil to his will what he had done with land specifically devised by his will, and what disposition he had made of a portion of the proceeds thereof, does not affect the question of ademption. Ademption generally depends upon a rule of law and not upon the intention of the testator. *May* v. *Sherrard*, 617.

16. *Suit to Test Validity of Donation by Will—Heirs of Testator.*—Where a will has long since been admitted to probate and

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its validity is not questioned, the heirs of the testator are not necessary parties to a suit to test the validity of a donation made by the will. *General Board* v. *Robertson*, 527.

17. *Testamentary Capacity—Opinions of Witnesses—Witness of Factum.*—Expressions of opinion by witnesses that the testator was not competent to make a will based upon facts which do not sustain the opinion are not to be considered as conflicting with the evidence of the witnesses of the factum who speak of the testator's condition immediately at the time of the execution of the paper in question, and who united in the unqualified statement that when the paper was executed by the testator his mind was clear and good, and that he fully comprehended what he was doing. *Huff* v. *Welch*, 74.

18. *Testamentary Capacity—Test.*—If, at the time of the execution of a will, a testator has sufficient mind and memory to intelligently understand the nature of the business in which he is engaged, to comprehend generally the nature and extent of the property constituting his estate and which he wishes to dispose of, and to know and to recall the objects of his bounty, and the manner in which he wishes to distribute his property among them, this is all the mental capacity needful to the execution of a valid will. If these requisites exist the will should be upheld, although the testator was of great age and his mind enfeebled, his body debilitated and his memory not as good as formerly, especially where he has not abandoned his former and usual interest in his business affairs, and is capable of understanding and looking after them. *Huff* v. *Welch*, 74.

See APPEAL AND ERROR, 28; EVIDENCE, 11, 25; HUSBAND AND WIFE, 1.

WITNESSES.

1. *Cross Examination.*—In an action against the makers of notes given for the purchase price of personal property, and secured by a deed of trust on said property, after one of the original parties to the transaction has testified that the property had been advertised for sale under the deed of trust and that he was present with money to buy it, but the property was not offered, it is not error to ask him on cross examination how much money he had for that purpose at that time, where he got it from, and what he did with it. *Davis* v. *Cole*, 501.

2. *Cross Examination—Foundation for Impeachment.*—In order to lay the foundation for attacking the credibility of a party witness, it is not error to permit him to be asked, on cross

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examination, if he had not given the plaintiff, as collateral for the notes in suit, a note signed by his grandfather, which the latter afterwards said was not signed by him, and was a forgery. *Davis* v. *Cole*, 501.

3. *Order of Examination—Appeal and Error.*—The order of the examination of witnesses lies chiefly in the discretion of the trial court, and its exercise is rarely, if ever, to be controlled by an appellate court. It will not be reviewed where no prejudice or injury to the party objecting is shown. *Ches. & O. R. Co.* v. *Chapman*, 32.

See EVIDENCE; WILLS, 17.

Y. M. C. A. BUILDINGS. See TAXATION, 10, 13.

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